Supreme Court, U.S.
FILED
AUG 26 1996
OFFICE OF THE CLERK

No. 96-324

In The

Supreme Court of the United States

October Term, 1995

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similary situated,

Petitioners,

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

75 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a fiduciary of a pension plan violated the ERISA duties of loyalty, prudence and diversification by purchasing the cheapest available plan termination annuity from an insurance company disproportionately backed by a single type of highly risky investment – junk bonds – in order to maximize the gain to himself, when the fiduciary both knew and should have known that the insurer was less creditworthy than other available annuity providers.

II. Whether a federal court may disregard a statutory interpretation by the very agency charged with administering the statute, on the ground that promulgation of the interpretation post-dated the underlying events before the court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

REFERENCES TO OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 9

I. The Opinion Of The Fourth Circuit Is In Conflict With The Decisions Of Two Other Courts Of Appeals 10

A. The Decision Of The Fourth Circuit Conflicts With That Of The Third Circuit Regarding The Duty Of Prudence 10

1. The Evidence Presented By Plaintiffs Demonstrating The Imprudence Of An Executive Life Annuity Was Sufficient To Render Summary Judgment Improper 10

2. Plaintiffs' Expert Reports Were By Themselves A Sufficient Basis To Deny Summary Judgment 13

B. The Decision Of The Fourth Circuit Conflicts With That Of The Ninth Circuit Regarding The Duty Of Loyalty 14

C. The Decision Of The Fourth Circuit Conflicts With Those Of Other Circuits In Other Respects 17

TABLE OF CONTENTS – Continued

Page

1. The Duty Of Diversification Prohibits An ERISA Fiduciary From Investing All Plan Assets In An Annuity From A Company Whose Assets Are Concentrated In One Risky Type Of Investment 17

2. ERISA Requires That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Must Disgorge The Unjust Enrichment Regardless Of Any Loss To The Plan 18

II. The Fourth Circuit's Sanctioning Of The District Court's Departure From The Accepted And Usual Course Of Proceedings Calls For An Exercise Of This Court's Supervision 20

A. Plaintiffs Presented Sufficient Evidence Of Genuine Issues Of Material Facts To Render Summary Judgment Improper 20

B. The Court Should Give Deference To The Interpretation Of The Agency Entrusted With Administering The Statute 21

III. Conclusion 24

TABLE OF AUTHORITIES

Page

CASES

Arakelian v. National Western Life Ins. Co., 680 F. Supp. 400 (D.D.C. 1987) 17

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 23

Brock v. Citizens Bank of Clovis, 841 F.2d 344 (10th Cir.), *cert. denied sub nom. Citizens Bank of Clovis v. McLaughlin*, 488 U.S. 829 (1988) 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984) 22

Dardaganis v. Grace Capital, Inc., 889 F.2d 1237 (2d Cir. 1989) 18

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir.), *cert. denied sub nom. Bierwirth v. Donovan*, 459 U.S. 1069 (1982) 15, 16

Fink v. National Savings and Trust Co., 772 F.2d 951 (D.C. Cir. 1985) 11

GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990) 17

Himes v. Shalala, 999 F.2d 684 (2d Cir. 1993) 23

In re Unisys Savings Plan Litigation, 74 F.3d 420, *reh'g denied*, 74 F.3d 420 (3d Cir. 1996), *petition for cert. filed* (May 6, 1996) ..... *passim*

Johnson v. Watts Regulator Co., 63 F.3d 1129 (1st Cir. 1995) 23

Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984) 16

TABLE OF AUTHORITIES – Continued

Page

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984), *cert. denied sub nom. Estate of Johnson v. Engle*, 489 U.S. 1078 (1989) 15, 18

M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hospital, Inc., 981 F.2d 160 (4th Cir. 1992), *cert. denied sub nom. Pleasant Valley Hosp. v. M & M. Medical Supplies & Serv.*, 508 U.S. 972 (1993) 21

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992), *cert. denied sub nom. Henss v. Martin*, 506 U.S. 1054 (1993) 16

N.Y. State Teamsters Counsel v. Estate of DePerno, 18 F.3d 179 (2d Cir. 1994) 18

National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994) 23

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S.Ct. 810 (1995) 22

Pilkington PLC v. Perelman, 72 F.3d 1396 (9th Cir. 1995) 9, 14, 15, 16

Riley v. Murdock, 890 F. Supp. 444 (E.D.N.C. 1995), *aff'd without published opinion*, 83 F.3d 415 (4th Cir. 1996) 1, 7, 8

Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 (8th Cir. 1994) 13

Rust v. Sullivan, 500 U.S. 173 (1991) 22

Stinson v. United States, 508 U.S. 36 (1993) 23

Stowell v. Sec. of Health & Human Services, 3 F.3d 539 (1st Cir. 1993) 22

TABLE OF AUTHORITIES – Continued

Page

Strickland v. Commissioner, Maine Dept. of Human Services, 48 F.3d 12 (1st Cir.), *cert. denied*, 116 S.Ct. 145 (1995) 22

Tilley v. Mead Corp., 490 U.S. 714 (1989) 23

Torrington Extend-A-Care Employee Ass'n v. N.L.R.B., 17 F.3d 580 (2d Cir. 1994) 22

Varity Corp. v. Howe, 116 S.Ct. 1065 (1996) 16, 19

Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994) 9, 12

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §§ 1001, et seq. 9

29 U.S.C.S. § 1103(c) 1

29 U.S.C. § 1104 .....1, 3, 11, 14

29 U.S.C. § 1109(a) 18

29 U.S.C.S. § 1342 1

29 U.S.C.S. § 1344 1

RULES AND REGULATIONS

Department of Labor Interpretative Bulletin No. 95-1, 60 Fed. Reg 12328, 29 C.F.R. § 2509.95-1 (1995) 8, 22

Fed. R. Civ. P. 56 .....3, 20

TABLE OF AUTHORITIES – Continued

Page

OTHER

House Conference Report No. 93-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5084-5085 17

III W. Fratcher, Scott on Trusts § 227.3 (4th ed. 1987) 16

Pension Annuity Protection in Light of The Executive Life Insurance Company Failure: Hearings before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 102nd Cong., Second Sess. Part II (1991) 3

REFERENCES TO OPINIONS BELOW

The opinion of the District Court below is reported at *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1995) (App. 5-41), and was affirmed without published opinion at 83 F.3d 415 (4th Cir. 1996) (App. 1-4).

GROUNDS OF THIS COURT'S JURISDICTION

On April 30, 1996, the Fourth Circuit affirmed *per curiam* the decision of the District Court granting Murdock's motion for summary judgment in *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1995) (App. 1-4; App. 5-41). A petition for rehearing and suggestion for rehearing en banc was denied on May 28, 1996 (App. 42-43).

Jurisdiction has been conferred on this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104, which provides:

> **§ 1104. Fiduciary duties**
>
> **(a) Prudent man standard of care.**
>
> (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so;. . . .

STATEMENT OF THE CASE

Defendant David Murdock, the fiduciary of the Cannon Mills Company retirement plan (the "Plan"), terminated the overfunded Plan shortly after acquiring a controlling interest in Cannon Mills. He then purchased an Executive Life Insurance Company annuity to provide the defined benefits promised under the terminated Plan, and took a "reversion" of all Plan assets remaining after payment of the annuity premium.

In April, 1991, Executive Life failed, in large part because of its heavy investment in junk bonds. The Plan participants' retirement benefits were immediately

slashed by 30 percent.[1] Plaintiffs, who are participants in the Plan, brought this action, challenging Murdock's selection of an Executive Life annuity as a breach of his fiduciary duties under Section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104.

Following discovery, Murdock moved for summary judgment under Fed. R. Civ. P. 56, arguing that there were no genuine issues of material fact and that as a matter of law his choice of Executive Life did not violate his fiduciary duties. In response, Plaintiffs presented substantial evidence by way of documents, expert reports and deposition testimony.

Plaintiffs proffered evidence of the following facts, which they contended were sufficient to establish a triable issue as to whether Murdock breached his duty of prudence by conducting an inadequate investigation and selecting an inappropriate carrier:

- Publicly available information reviewed by Plaintiffs' expert, Professor David F. Babbel, showed that Executive Life's asset portfolio contained an inordinate amount of non-investment grade, "junk" bonds. As much as 60-70% of Executive Life's total assets and 78-91% of its fixed maturity assets consisted of junk bonds. These assets

---

[1] *See Pension Annuity Protection in Light of The Executive Life Insurance Company Failure: Hearings before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 102nd Cong., Second Sess. Part II, at 6 (1991) (statement of Representative Sherwood L. Boehlert) (hereinafter "Hearings").

exhibit considerable default risk. (JA 435-438. *See also* JA 457, 1373).[2]

- The average maturity of Executive Life's bond portfolio was only 8.8 years and therefore poorly matched the Plan obligations, which could last 40 to 50 years. (JA 455).

- Murdock *knew* about the high proportion of junk bonds in Executive Life's portfolio, *knew* that junk bonds were riskier than investment grade bonds, and *understood* that the risk associated with junk bonds made them an unsuitable investment for "a pension plan for widows and orphans." (JA 1601-02, 1638-1640).

- Murdock *knew* that the New York commissioner of insurance had disqualified Executive Life's parent company from doing business in New York. (JA 1639).

- The California Insurance Commissioner had determined that Executive Life was statutorily insolvent in 1984. (JA 300-332, 435, 456).

- The two sources Murdock claimed to have consulted and relied upon both reported significant information which called into question Executive Life's creditworthiness:

    - A.M. Best, whose ratings were inflated, nonetheless reported: that Executive Life had four or more Insurance Regulatory Information Systems (IRIS) ratios outside normal ranges prescribed by the National Association of Insurance Commissioners (NAIC); that Executive Life's reserves were likely underestimated;

---

[2] Factual references are to the Joint Appendix filed in the Court of Appeals.

and that Executive Life was ranked as a Class IX insurer with policyholders' surplus far below that of other insurers under consideration. (JA 456-58).

- Hewitt Associates did not recommend purchasing an annuity from Executive Life, but instead provided a written report to Murdock's Investment Committee which expressed "reservations" about Executive Life, including concerns about Executive Life's lack of experience, negative publicity, short term bond maturities and vulnerability to interest rate fluctuations, as well as the overriding concern about Executive Life's excessive commitment to low-grade junk bonds. (JA 266, 267-270, 278-280, 1387-94, 1582-82, 1588-89, 2043-45).

- Murdock took no steps to monitor Executive Life after the annuity selection. Additional information was disclosed within one year thereafter in the 10-K forms of Executive Life's parent company, which further called Executive Life's creditworthiness into question, e.g., the New York insurance department disallowed $151.5 million worth of reinsurance, and Executive Life was having difficulty in paying promised rates of return. (JA 364, 459-460).

- Plaintiffs' well-qualified experts submitted reports which concluded that the selection of Executive Life was imprudent based upon publicly available information which a reasonable investigation would have revealed. (JA 432-499).

In addition, Plaintiffs submitted evidence of the following facts to support their claim that Murdock breached his duty of loyalty by choosing an annuity

carrier on the basis of price in order to maximize his own reversion:

- Murdock had a conflict of interest in selecting an annuity provider because any cost savings from purchasing a lower cost annuity would be retained by Murdock personally. (JA 366-67, 368, 375, 377-78, 461, 1622).
- Memoranda prepared in connection with the termination of the Plan revealed that Murdock's goals were to "maximize the cash being returned to the Company" and to increase "the dollar value of revertible surplus through the selection of an appropriate annuity vehicle". (JA 367, 376).
- Murdock's Investment Committee member Michael Werner admitted that one of his priorities in connection with the Plan termination was "to preserve the plan assets and to function in coordination with the reversion activities." (JA 1940-41).
- The initial Insurance Carrier Candidate List prepared by Hewitt Associates discussed whether each carrier had been "competitive" recently, a clear reference to price. (JA 259).
- A Hewitt Associates' report expressly stated that price was a "factor[ ] going into the [annuity] selection process." (JA 267).
- Charles McKenzie of Hewitt Associates explained Murdock's company's "focus" on Executive Life by observing that "it would be fairly natural to focus on the company with the low bid." (JA 1587).
- Of eight proposals submitted in the second round of bidding, Murdock only reviewed the three deemed "competitive." (JA 278).

- The proposals which made the second round cut were the three lowest priced bids, and the proposal ultimately selected (Executive Life) was the very cheapest bid. (JA 278-79).

- Murdock, who personally selected the annuity carrier, also personally received the additional $2.5 million saved by the Plan in purchasing the cheapest annuity. (JA 298).

- Ten of the eleven companies on the initial bid list received "A+" ratings from A.M. Best, but Executive Life was one of the few that received negative comments from Hewitt Associates. The record does not reveal any non-price reason for selecting Executive Life ahead of the other carriers or any attempt by Murdock to investigate any other annuity providers. (JA 259).

Notwithstanding the foregoing evidence, the District Court granted summary judgment for Murdock. Holding that "[p]laintiffs have not offered any evidence to support the opinion that Murdock and the committee should have known of any problems at Executive Life in 1986," 890 F. Supp. at 458-59 (App. 35),[3] the Court concluded that Murdock's selection of Executive Life was prudent in view of his reliance on Hewitt Associates and the A.M. Best rating. 890 F. Supp. at 458 (App. 34). The District Court disregarded the information known to Murdock and his advisors, and declined to take into account either the conclusions or the supporting (publicly available) information set forth in the reports of Plaintiffs' experts. 890 F. Supp. at 458-59 (App. 34-35).

---

[3] References to the Appendix accompanying this Petition are cited as "App."

The District Court did not address whether Murdock's selection of Executive Life was based upon price or otherwise motivated by self-interest, but instead rejected Plaintiffs' claims for breach of the duty of loyalty by holding that a fiduciary could "meet the 'exclusive purpose' requirement by satisfying the prudence requirement." 890 F. Supp. at 459 (App. 35). The District Court never addressed whether Murdock had or breached the duty of diversification under ERISA § 404(a)(1)(C).

On appeal, in a short *per curiam* opinion, the Court of Appeals deferred to the decision of the District Court. In addition, because Plaintiffs (presumedly) "received every dollar of benefits to which they were entitled under the Plan" (App. 3), the Court of Appeals failed to consider that Murdock received a profit from purchasing the cheapest available annuity in alleged breach of his fiduciary duties.

The Secretary of Labor, who is responsible for administering Title I of ERISA, participated in the Court of Appeals as *amicus curiae*. The Department of Labor has interpreted ERISA § 404 to require that when an ERISA fiduciary purchases an annuity to provide plan benefits promised in a defined benefit plan, the fiduciary must select the safest available annuity. The Secretary's amicus brief provided the Department's interpretation, which culminated in its promulgation of a regulation codified at 29 C.F.R. § 2509.95-1, to the Court. The Court of Appeals summarily rejected the Department's position without addressing its merit on the ground that its promulgation post-dated Murdock's conduct. (App. 4).

REASONS FOR ALLOWANCE OF THE WRIT

In upholding the decision of the District Court that Murdock's purchase of an Executive Life plan termination annuity did not breach his fiduciary duties under ERISA, the Fourth Circuit placed itself directly in conflict with the Third and the Ninth Circuits, which resolved precisely the same issues in favor of the plan participants. *See In re Unisys Savings Plan Litigation*, 74 F.3d 420, *reh'g denied*, 74 F.3d 420 (3d Cir. 1996), *petition for cert. filed* (May 6, 1996); *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995). *See also Waller v. Blue Cross of California*, 32 F.3d 1337, 1342 (9th Cir. 1994) (a case involving Executive Life issues on a motion under Rule 12(b)(6)). In addition, the Fourth Circuit sanctioned such a departure of the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The issues raised in this Petition arise every time a fiduciary purchases an annuity as a means of distributing retirement benefits to ERISA plan participants. Indeed, the importance of these issues is demonstrated by the participation of the Secretary of Labor, who has primary responsibility for enforcement of Title I of ERISA, 29 U.S.C. §§ 1001, *et seq.*, as *amicus curiae* in the Court of Appeals. The Fourth Circuit's cursory treatment of these important issues and the views of the Secretary of Labor highlight the need for review by this Court.

I. The Opinion Of The Fourth Circuit Is In Conflict With The Decisions Of Two Other Courts Of Appeals.

A. The Decision Of The Fourth Circuit Conflicts With That Of The Third Circuit Regarding The Duty Of Prudence.

1. The Evidence Presented By Plaintiffs Demonstrating The Imprudence Of An Executive Life Annuity Was Sufficient To Render Summary Judgment Improper.

On January 4, 1996, the Third Circuit, in *Unisys*, reviewed the decisional law regarding the duty of prudence in the context of the purchase of guaranteed investment contracts (GICs) from Executive Life. The Executive Life GICs in *Unisys* were purchased by the fiduciary as one part of one of several fund alternatives offered to the participants, who could transfer contributions among funds with relative ease. The facts of *Unisys* contrast from those in the case at bar, where all the Plan assets were invested in an annuity from a single company, which was to provide benefits over a 40-50 year period, and the fiduciary's choice of annuity provider was imposed upon the participants, who thus had no opportunity to transfer funds in or out of the investment. The facts in this case thereby impose a burden on the fiduciary, at least the same as in *Unisys*, and justifiably would support an even greater burden on Murdock.

Significantly, *Unisys* held that the duty of prudence applied to the purchase of Executive Life GICs under the facts of the case. The court reviewed the considerable decisional law describing the duty of prudence, including the duty to conduct an independent investigation into the

merits of a particular investment. *Id.* at 434-36. The court concluded:

> Of course, the thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered. *Fink [v. National Savings and Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985)] (Scalia, J. concurring in part and dissenting in part) ("[T]he determination of whether an investment was objectively prudent is made on the basis of what the trustee knew *or should have known*; and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate." (emphasis in original)).

Unisys, 74 F.3d at 436.

The following evidence raised genuine issues of material fact to support the *Unisys* plaintiffs' claim that the investment of plan assets in Executive Life GICs violated section 1104(a)(1)(B)'s duty of prudence: the high ratings received by Executive Life had been questioned in financial circles; at least one reputable consultant had strongly recommended against investments in Executive Life annuity contacts; Executive Life's reinsurance practices were under scrutiny by state regulators. *Id.* at 436. Significantly, the Third Circuit concluded that whether a rating was a reliable measure of Executive Life's financial status and whether the fiduciary was capable of using the rating effectively were matters to be decided at trial. *Id.*

Unisys noted additional issues for trial: whether Executive Life was an appropriate choice for GICs of

more than three-years' duration; whether the disparity between the interest rates offered by Executive Life and those offered by other bidders could lead a factfinder to infer that the risk accompanying Executive Life's yields was unacceptably high; and whether the fiduciary was equipped to conduct the GIC bids unassisted. *Id.* at 437. The court also noted that the plaintiffs' expert opinion that the purchase of long-term Executive Life GICs was imprudent was "itself some evidence of Unisys' imprudence, capable of defeating Unisys' motion for summary judgment." *Id.* at 437.

Plaintiffs in this case presented evidence of the same facts that *Unisys* found sufficient to deny summary judgment, and more. However, the District Court ignored the substantial evidence that Murdock knew and should have known about Executive Life's financial instability, despite the fact that he was exercising fiduciary duties at "a critical moment in the life of the plan." *Waller*, 32 F.3d 1342. In addition, the Courts below did not consider Plaintiffs' evidence that rating services rated over 60% of Executive Life's bonds as below investment grade, that Executive Life's high ratings were questioned in financial circles, causing a Hewitt consultant to prepare a report that described the negatives about Executive Life, and that state regulators were questioning Executive Life's reinsurance practices, which had resulted in the New York commissioner of insurance disqualifying Executive Life, a fact of which Murdock was admittedly aware. Significantly, Plaintiffs presented evidence that the rating by A.M. Best was not a reliable measure of Executive

Life's financial status and created genuine issues concerning whether Murdock was capable of using the rating effectively.

Unisys draws heavily on ERISA decisions from other Circuits spanning over a decade. *Unisys*, 74 F.3d at 434. Moreover, *Unisys* comports with the weight of authority that an investigation satisfying the duty of prudence must be more than a "magic wand that [the fiduciaries wave] over the transaction to ensure that their responsibilities are fulfilled." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). In contrast, the Fourth Circuit opinion fails to cite any authority. This Court should not permit to stand the Fourth Circuit's view of the duty of prudence that falls out of the mainstream.

2. Plaintiffs' Expert Reports Were By Themselves A Sufficient Basis To Deny Summary Judgment.

Unlike the court in *Unisys*, the District Court below cast aside the expert reports offered by the Plaintiffs as "conclusory opinion[s] . . . not supported by evidence." 890 F.Supp. at 458 (App. 35). These expert reports were clearly admissible and cited the ample factual bases for the opinions; each report attached a list of sources. The Courts below inexplicably failed to consider the reports, while similar reports presented in *Unisys* were regarded as some evidence of the fiduciary's imprudence capable of defeating the fiduciary's motion for summary judgment.

This Court should grant the writ to resolve the conflict in the Circuits regarding the duty of prudence.

B. The Decision Of The Fourth Circuit Conflicts With That Of The Ninth Circuit Regarding The Duty Of Loyalty.

The Ninth Circuit on December 27, 1995, held that a record setting forth precisely the same material facts in precisely the same procedural posture as presented in this case raised "serious issues of fact as to the reasonableness of the defendants' conduct." *Pilkington*, 72 F.3d at 1401.[4] In particular, the defendant fiduciaries in *Pilkington* contended that they reasonably relied upon the rating of Standard & Poors and A.M. Best and chose the lowest bidder, the principal argument advanced by Murdock in this case. The court unambiguously rejected this argument:

> Legal authority does not support their contention that a mere ratings scan satisfied their fiduciary duty of loyalty to the plan. . . . In addition, there is evidence that some voices in the insurance industry had expressed misgivings about the soundness of those ratings at the time of the spin-off. ERISA's command to fiduciaries is unequivocal: fiduciaries must act *'solely in the interest* of the participants and beneficiaries' and *'for the exclusive purpose of* providing benefits to participants and their beneficiaries.' 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added).

---

[4] Thus, the Ninth Circuit reversed the decision of a California district court, which had issued an unpublished decision that was relied upon heavily by Murdock in his briefs in the Courts below.

Pilkington, 72 F.3d at 1401 (citing *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984), *cert. denied sub nom. Estate of Johnson v. Engle*, 489 U.S. 1078 (1989)).

The court also noted the evidence that reversion maximization figured prominently in the fiduciary's plan termination decision. Similar evidence was presented by the Plaintiffs in this case. However, unlike the Fourth Circuit, which failed to address this argument, *Pilkington* made clear that the fiduciaries' conflicts of interest can violate ERISA's loyalty requirement. The Ninth Circuit thus held that because the fiduciary's motivation may have deviated from that mandated by ERISA, summary judgment in favor of the fiduciary was improper. *Pilkington*, 72 F.3d at 1401 (citing *Leigh*, 727 F.2d at 125; *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied sub nom. Bierwirth v. Donovan*, 459 U.S. 1069 (1982)). Moreover, the Ninth Circuit held that the district court had engaged in fact finding when it held that no evidence had been presented that the fiduciaries were motivated by economic self-interest; summary judgment was not appropriate to resolve this contested issue of fact. *Pilkington*, 72 F.3d at 1402.

Finally, *Pilkington* found it significant that the fiduciaries may have had actual notice of Executive Life's heavy purchase of junk bonds, one factor that contributed to its demise; thus, the fiduciaries may have known of the insecurity of the carrier's investments. *Id.* at 1402. Here, Murdock's knowledge of Executive Life's heavy junk bond holdings and the consequent insecurity of the carrier's investments is undisputed. Here, as in *Pilkington*, Murdock's knowledge of these facts should have rendered summary judgment improper.

The panel did not even analyze the duty of loyalty, much less follow the decisions of other Circuits. To the contrary, the Fourth Circuit simply relied on what it termed the "well-reasoned opinion of the district court" (App. 4), even though the District Court erroneously collapsed the duty of loyalty into the duty of prudence. 890 F. Supp. at 459. The District Court's analysis is clearly incorrect, because the duty of prudence may overlap, but is different from the duty of loyalty. *See Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir. 1992), *cert. denied sub nom. Henss v. Martin*, 506 U.S. 1054 (1993); *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984); *Donovan v. Bierwirth*, 680 F.2d at 271; III W. Fratcher, Scott on Trusts § 227.3 (4th ed. 1987).

In *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), this Court set a high standard of loyalty in noting that "sav[ing] the employer money at the beneficiary's expense, is not to act 'solely in the interest of the participants and beneficiaries.' " *Varity*, 116 S. Ct. at 1065. *Pilkington*'s view of the duty of loyalty comports with the standard set by this Court in *Varity*, and the substantial case law of other circuits. *Pilkington*, 72 F.3d at 1401-02.

In this case, the Fourth Circuit endorsed the District Court's collapsing of the duties of prudence and loyalty, and took a view of fiduciary duties not held by any other Circuit. The Courts below failed to review the decision-making of Murdock with the enhanced level of scrutiny required by Murdock's manifest conflict of interest. In short, the Courts below sanctioned Murdock's purchase of the cheapest available annuity without any evidence that he did any sort of comparative analysis to determine

Executive Life's safety relative to that of other annuity providers.

This Court should grant the writ to resolve the conflicts in the Circuits on the duty of loyalty.

C. The Decision Of The Fourth Circuit Conflicts With Those Of Other Circuits In Other Respects.

There are other conflicts between the decision of the Fourth Circuit below and those of other Circuits which, while less blatant than those concerning the duties of prudence and loyalty, are nonetheless deserving of this Court's attention.

1. The Duty Of Diversification Prohibits An ERISA Fiduciary From Investing All Plan Assets In An Annuity From A Company Whose Assets Are Concentrated In One Risky Type Of Investment.

Plaintiffs argued below that Murdock breached the duty of diversification under ERISA § 404(a)(1)(C) by purchasing an annuity from Executive Life, which had an inordinately high concentration in one type of investment, risky junk bonds. Brief of Appellants at 36-38 (citing House Conference Report No-93-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5084-5085; *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990); *Brock v. Citizens Bank of Clovis*, 841 F.2d 344 (10th Cir.), *cert. denied sub nom. Citizens Bank of Clovis v. McLaughlin*, 488 U.S. 829 (1988); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400,

406-07 (D.D.C. 1987). In *Unisys*, the court concluded that the fiduciary's satisfaction of the duty to diversify is properly assessed by examining the concentration of Executive Life investments. *Unisys*, 74 F.3d at 440. The Fourth Circuit, like the District Court below, mischaracterized Plaintiffs' argument and rejected it. Guidance from this Court is needed on the applicability of the duty to diversify to the purchase of plan termination annuities from an insurance company.

2. ERISA Requires That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Must Disgorge The Unjust Enrichment Regardless Of Any Loss To The Plan.

Citing the presumed "fact that [Plaintiff] Riley and her class have received every dollar of benefits to which they were entitled under the Plan," the Fourth Circuit failed to recognize that by breaching his fiduciary duties, Murdock placed the plan participants' defined benefits in jeopardy and shifted to them the risk of any loss of benefits, a risk that Murdock as the fiduciary should have borne. Moreover, the Fourth Circuit placed itself in conflict with the law in other circuits that ERISA clearly contemplates actions against fiduciaries who profit by using trust assets in violation of their ERISA duties, even where the plan beneficiaries do not suffer direct financial loss. *See, e.g., Leigh v. Engle*, 727 F.2d at 122 (discussing ERISA § 409(a), 29 U.S.C. § 1109(a)). *N.Y. State Teamsters Counsel v. Estate of DePerno*, 18 F.3d 179, 183 (2d Cir. 1994); *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1243 (2d Cir. 1989).

The foregoing cases emphasize that this principle is rooted in well-established trust law embodied in ERISA. As discussed at length by this Court in *Varity*, while ERISA's fiduciary standards draw much of their content from the common law of trusts:

> . . . trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.

116 S. Ct. at 1072. It is inconsistent with this congressional determination to interpret ERISA as offering to plan participants and beneficiaries less protection than that available under the common law of trusts. Yet the Fourth Circuit provided lesser protection in refusing to examine whether Murdock was unjustly enriched by his fiduciary breaches and in failing to place upon Murdock the burden of justifying his actions.

This Court should grant the writ to resolve the conflict created by the decisions of the Courts below, which refused to hold Murdock accountable for gains attributable to his breaches of fiduciary duty.

* * *

Given the authority in the other Circuits, the message sent by the Courts below is clear: ERISA plan participants in the Fourth Circuit do not enjoy the same protections as those in every other Circuit. This Court should grant the writ to assure that ERISA is applied in the same fashion by all federal courts.

II. The Fourth Circuit's Sanctioning of the District Court's Departure From The Accepted And Usual Course Of Proceedings Calls For An Exercise Of This Court's Supervision.

A. Plaintiffs Presented Sufficient Evidence Of Genuine Issues Of Material Facts To Render Summary Judgment Improper.

There are significant facts of record demonstrating the breach of fiduciary duties, many of which were undisputed by Murdock. The undisputed facts include the purchase by Murdock, the plan fiduciary, of the cheapest plan termination annuity from Executive Life, despite his admitted knowledge that Executive Life was disproportionately invested in junk bonds and was disqualified from doing business in the State of New York.

The Fourth Circuit upheld the decision of the District Court and refused Plaintiffs the opportunity to present at trial the overwhelming facts that Murdock breached his duties under ERISA § 404. This result occurred because, even though Plaintiffs were entitled to *de novo* review, the Fourth Circuit ignored the material facts of record and simply, without analysis, adopted the decision of the District Court, which had similarly ignored the facts of record. Rather than analyze the arguments of Plaintiffs, the Fourth Circuit rejected the appeal by simply deferring to the so-called "thorough" opinion of the District Court. In fact, although the District Court wrote a lengthy opinion, it abdicated its responsibility under Rule 56 to analyze the voluminous facts presented by the Plaintiffs.

Plaintiffs did not simply rest on the allegations of their complaint, but amassed and came forward with

substantial evidence creating genuine factual disputes regarding Murdock's liability for breach of fiduciary duties. Plaintiffs more than met their burden as the nonmoving party under Fed. R. Civ. P. 56. A party cannot be denied a trial simply because the court deciding summary judgment motions chooses to ignore the evidence brought forward by the nonmoving party.

Another serious departure from judicial norms was the District Court's rejection of Plaintiffs' expert testimony, contrary to the law of the Circuit, a matter ignored by the Court of Appeals. *See M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 166 (4th Cir. 1992), *cert. denied sub nom. Pleasant Valley Hosp. v. M & M Medical Supplies & Serv.*, 508 U.S. 972 (1993). As discussed at page 12, *supra*, such expert opinions were the basis for denying summary judgment in *Unisys*. Given the factual support for the experts' opinions and the absence of any challenge to their qualifications, those opinions should have been considered.

On this record, summary judgment was wholly improper. This Court should grant the writ to assure that proper standards of summary judgment are employed by the federal courts in order that plan participants in the Fourth Circuit are afforded the protections mandated by Congress in ERISA.

B. The Court Should Give Deference To The Interpretation Of The Agency Entrusted With Administering The Statute.

In his Brief as *Amicus Curiae* in the Fourth Circuit, the Secretary of Labor provided his interpretation of the duty

of loyalty. As interpreted by the Secretary, when a fiduciary selects an annuity to cover a pension plan's obligations after plan termination, the duty of loyalty requires that the fiduciary seek the safest available annuity to assure payment of the benefits which the plan promised to its participants. *See* Department of Labor Interpretative Bulletin No. 95-1 ("IB 95-1"), 60 Fed. Reg. 12328, 12330 (1995) (codified at 29 C.F.R. Part 2509.95-1 (1995)). *See also Hearings* at 15, 19 (Statement of David George Ball, Assistant Secretary, Pension and Welfare Benefits, U.S. Department of Labor).

A federal court must accept the construction of an act by the federal agency charged with their administration. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, *reh'g denied*, 468 U.S. 1227 (1984). *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810 (1995). Even where an agency's interpretation represents a "sharp break" with prior interpretations, it is entitled to deference. *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (quoting *Chevron*, 467 U.S. at 862). Accordingly, other Circuits give "ample latitude" to interpretations of statutes by the agency charged with its administration. *See, e.g., Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 18 (1st Cir.), *cert. denied*, 116 S. Ct. 145 (1995); *Torrington Extend-A-Care Employee Ass'n v. N.L.R.B.*, 17 F.3d 580, 589 (2d Cir. 1994); *Stowell v. Sec. of Health & Human Services*, 3 F.3d 539, 544 (1st Cir. 1993) (modification of agency interpretation ordinarily retains its entitlement to deference).

Of course here, the "safest available annuity" standard promulgated in the Department of Labor's regulation and discussed in the Secretary's *amicus curiae* brief

did not represent a sharp break from its prior interpretation, but rather is simply a codification of its longstanding interpretation of ERISA. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that an agency's commentary on its promulgated guidelines "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 508 U.S. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). *Cf. Tilley v. Mead Corp.*, 490 U.S. 714, 726 (1989) ("For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to 'embar[k] upon a voyage without a compass.' ") (brackets in original).

Even when such commentary conflicts with prior judicial construction, it is binding on the federal courts. *Stinson*, 508 U.S. at 46. The Ninth Circuit understands that *Stinson* and *Rust* require the federal courts to give deference not only to agency interpretations of its regulations, but also to the agency's *amicus curiae* brief where the brief reaffirms its interpretation of its regulations. *National Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994). *See also Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995) (deference to Department of Labor's interpretation of ERISA regulations); *Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993) (agency interpretation of all sections of statute entitled to deference).

The Fourth Circuit below refused even to consider the Secretary's interpretation, let alone give it any deference, thus warranting review by this Court. This Court should grant the writ to accord the Secretary of Labor the deference due to his regulation interpreting ERISA on the

important issue of fiduciary duties in the purchase of a plan termination annuity.

III. Conclusion

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION; CABARRUS BANK & TRUST COMPANY, Trustee,

Defendants-Appellees,

and

FIELDCREST CANNON MILLS, INCORPORATED; CHARLES A. CANNON, Charitable Trust Number One; CHARLES A. CANNON, Charitable Trust Number Two; CHARLES A. CANNON, Charitable Trust Number Three; CANNON FOUNDATION, INCORPORATED; TRUST UNDER THE WILL OF CHARLES A. CANNON; WILLIAM C. CANNON,

No. 95-2414

Estate of the foregoing, individually and as a trustee; GEORGE A. BATTE, JR., individually and as a trustee; J. HARRIS CANNON, individually and as a trustee; OTTO G. STOLZ, individually and as a trustee; HAROLD P. HORNADAY; DONALD S. HOLT, Estate of the foregoing; ANDREW W. ADAMS; ALBERT M. ALLRAN; JOSEPH C. RIDENHOUR; HUBERT J. TAME; JAMES R. JOLLY; FIRST UNION NATIONAL BANK, Trustee,

Defendants.

SECRETARY OF LABOR,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Court Judge.
(CA-92-442-5-BR)

Argued: April 1, 1996

Decided: April 30, 1996

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant Johnsie Riley, a class representative for former employees of Cannon Mills Corporation (Cannon), participated in Cannon's Retirement Plan (the Plan). Riley asserts that Appellees, David Murdock and affiliated entities (collectively, Murdock), violated various provisions of the Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp.1995) (ERISA), arising out of the amendment and termination of the Plan. The gravamen of Riley's suit is that Murdock breached his fiduciary duties in purchasing a group annuity contract from Executive Life Insurance Company, which administered the Plan but ultimately went into conservatorship, and that Murdock failed to monitor the financial integrity of Executive Life subsequent to purchasing the annuity. In a thorough, published opinion, the district court addressed all of Riley's claims and granted summary judgment in favor of Murdock regarding all claims pertinent to this appeal. *See Riley v. Murdock*, 890 F.Supp. 444 (E.D.N.C.1995).

Before us, Riley advances the same arguments that proved unsuccessful in the district court. Despite the fact that Riley and her class have received every dollar of benefits to which they were entitled under the Plan, Riley appeals, specifically positing that Murdock breached his fiduciary duties in three ways: (1) he violated the exclusive purpose requirement of 29 U.S.C.A. § 1104(a)(1)(A) by purchasing the cheapest available annuity; (2) he violated the prudence requirement of 29 U.S.C.A. § 1104(a)(1)(B) because he knew or should have known

that Executive Life did not or would not enjoy financial integrity and by failing to monitor Executive Life's financial health; and (3) he violated the diversification requirement of 29 U.S.C.A. § 1104(a)(1)(C) by investing in a single termination policy.

Additionally, the Department of Labor (DOL) intervened in this appeal, urging us to adopt a standard that an ERISA fiduciary *must select* the *safest* available annuity to assure payment of the benefits that a plan promises to its participants. In urging adoption of this standard, the DOL relies on its Interpretative Bulletin 95-1, *see* 60 Fed.Reg. 12,328, 12,330 (1995) (to be codified at 29 C.F.R. § 2509.95-1), which was published approximately three months prior to the district court's judgment and well after the events at issue.

We have carefully examined the record, the briefs, the parties' oral arguments, and the applicable law, and we affirm the grant of summary judgment in Murdock's favor based on the well-reasoned opinion of the district court. Regarding adoption of "the safest available" standard urged by the DOL, no federal court has adopted such a standard, and the circumstances of this case do not merit application of such a demanding standard.

AFFIRMED

Johnsie RILEY, et al., Plaintiffs,

v.

David H. MURDOCK, et al., Defendants.

No. 92-442-CV-5-BR.

United States District Court,
E.D. North Carolina,
Western Division.

June 13, 1995.

ORDER

BRITT, District Judge.

This matter is before the court on motions for summary judgment filed by the following defendants: (1) Fieldcrest Cannon, Inc. (Fieldcrest); (2) Otto Stolz (Stolz); (3) George A. Batte, Jr., Estate of J. Harris Cannon, Harold P. Hornaday, Andrew W. Adams, Joseph C. Ridenhour, Hubert J. Toumey and James R. Jolly (the Directors); and (4) David H. Murdock (Murdock). All motions have been extensively briefed and are now ripe for decision.

I. FACTS

The rather complicated and involved facts surrounding this matter are extensively set out in an Order of this court dated 30 July 1993 and repeating them here is not necessary. However, a brief sketch of the relevant events leading up to the motions at bar would facilitate a more complete understanding of the discussion to follow.

This action is brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

§ 1001, *et seq.*[1] Plaintiffs are employees or retirees of Cannon Mills, Inc. (Cannon) and are participants in Cannon's retirement plan (the Plan). They allege that the defendants breached their fiduciary duty by failing to prudently manage the Plan for the benefit of its participants. Specifically, plaintiffs challenge the seizure of surplus plan assets and the purchase of an annuity backed by junk bonds to increase the dollar amount of the surplus.

Cannon has had several different retirement plans over its many years in operation. Until 1979, the employees contributed to the Plan. For the purposes of this matter, this has become known as the 1976 Plan. In 1979, the 1976 Plan was amended by eliminating employee contributions and altering the termination clause to specifically provide that any surplus assets at termination would revert to the employer rather than the plan participants. This will be referred to as the 1979 Plan.

Approximately six months after this amendment, defendant Murdock began purchasing substantial amounts of Cannon stock and in 1982, bought Cannon outright. Plaintiffs allege that in December 1985 Murdock caused the 1979 Plan to be amended to provide for the reversion of the surplus assets to one of his corporations and the purchase of an annuity upon termination of the

---

[1] The original complaint also contained pendent state law claims for common law fraud and conspiracy which were dismissed by this court in its 30 July 1993 Order. 828 F.Supp. 1215.

Plan. The Plan was allegedly terminated on 18 December 1985.

In June 1986 defendant Fieldcrest merged with Cannon. On 2 July 1986, an annuity was purchased to fund obligations to participants of Cannon's terminated retirement plan. The purchase was negotiated by both Murdock and Fieldcrest. Ultimately, the company issuing the annuity went into receivership, and plaintiffs contend that they have suffered as a result. In sum, plaintiffs allege that the entire series of transactions described above was an elaborate scheme orchestrated in violation of ERISA to allow Fieldcrest to buy Cannon at a reduced price and made it possible for Murdock to receive the surplus assets upon termination of the 1979 Plan.

II. DISCUSSION

Summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The United States Supreme Court has written:

> In our view, the plain language of rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the absence of an element to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The Fourth Circuit has recently commented on *Celotex* and firmly agreed with

the concept that the party moving for summary judgment does not have to produce evidence, but can prevail on summary judgment by simply arguing that there is an absence of evidence by which the nonmovant can prove its case. *See Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 135 (1995). Each of the four motions for summary judgment will be analyzed pursuant to the above-stated and well-established rules of law.

A. Fieldcrest's Motion for Summary Judgment

Plaintiffs allege that Fieldcrest had fiduciary duties pursuant to 29 U.S.C. § 1002(21) by virtue of the authority and responsibility it assumed under Section 4.03 of the Stock Purchase Agreement dated 3 December 1985 and the fact that Fieldcrest assumed responsibility for the administration of the Plan. Plaintiffs assert that Fieldcrest violated these duties and conspired with other defendants to do so. Plaintiffs admit that Fieldcrest did not receive any of the surplus assets upon termination of the Plan; however, they maintain that the purchase price Fieldcrest paid to acquire Cannon is less than it would have been if Fieldcrest had not allowed Murdock to keep the Plan, amend the Plan in order to allow the surplus to revert to Murdock, and agree to the purchase of an imprudent annuity.

Fieldcrest maintains that it was never a fiduciary under ERISA. It further asserts that it never participated in the administration of the Plan, never attempted to and did not purchase the Plan, and had no involvement in the

termination of the Plan or the purchase of the annuity from Executive Life.

A person or entity is a fiduciary with respect to an ERISA-governed plan:

> To the extent (i) he [or it] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he [or it] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he [or it] has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

29 U.S.C.A. § 1002(21)(A). Subsection (ii) is not at issue; however, plaintiffs argue that Fieldcrest had discretionary authority over the Plan pursuant to the Stock Purchase Agreement and that it actually exercised discretionary authority over the disposition of Plan assets by its involvement in the purchase of the Executive Life annuity.

As explained above, on a motion for summary judgment a defendant does not have to prove an absence of evidence to support a plaintiff's case because the burden rests with the plaintiff to support all elements of its claim. As the discussion below will make evident, plaintiffs are unable to satisfy the burden with respect to proving Fieldcrest had a fiduciary duty under ERISA.

1. Fiduciary Duty Under § 1002(21)(A)(iii)

Plaintiffs assert that the language of the Stock Purchase Agreement entered into by Cannon and Fieldcrest gave Fieldcrest discretionary authority and responsibility with respect to the Cannon Plan, and thus, a fiduciary duty under ERISA. The relevant portion of the Stock Purchase Agreement at issue is Section 4.03 addressing employee benefit plans. By its own terms, Section 4.03 permits either the Sellers' (defined in the agreement as Pacific Holding Corporation and Cannon Holding Corporation) adoption of a new pension plan or the purchase of annuity under guidelines set forth in a separate document known as Schedule 4.03. The option of purchasing an annuity was chosen and subparagraph (e) of Schedule 4.03 addresses that. Schedule 4.03 provides, in pertinent part:

> Seller may, in its sole discretion, provide for the funding of all accrued benefits, including all ancillary benefits, whether or not vested, accrued through December 28, 1985, by causing the purchase of annuity contracts satisfactory to the Pension Benefit Guaranty Corporation.

Plaintiffs contend that the last phrase quoted above automatically makes Fieldcrest a fiduciary and vested it with discretionary authority over plan administration under ERISA's definition of fiduciary.

The plain language of the Stock Purchase Agreement, however, makes it clear that Schedule 4.03 was intended to modify Section 4.03 and that Schedule 4.03 was drafted to "set forth the rights and duties of the parties" regarding any annuities. (Tennyson Dep. at 19-20). There is no

language in any of the agreements requiring Fieldcrest to approve any annuity contracts.

Further, there is testimony, in affidavit form, that Peter Tennyson, the primary legal representative and negotiator for David Murdock, did not intend for any of the provisions to require Fieldcrest to approve any annuity that might be selected. *Id.* at 32-33. Joe Ely, Fieldcrest's Chairman and a principle negotiator for the Cannon purchase, also stated that the Stock Purchase Agreement was not intended to require Fieldcrest's approval of any annuities. (Ely Dep. at 34-35). None of Fieldcrest's personnel responsible for pension matters were involved in drafting the Stock Purchase Agreement nor were they operating under the belief that Fieldcrest had any control over annuity selection. (Midgley Dep. at 21; Mitchell Dep. at 61; Raines Dep. at 15.) As well, testimony of the individuals involved in the negotiations indicates that annuities were never even discussed and that Fieldcrest wanted Cannon to take responsibility for any pension plan. (Murdock Dep. at 506; Tennyson Dep. at 18-19). There is, however, evidence that mention was made of terminating the Cannon pension plan and that Ely expressed concern that Cannon Plan participants be treated fairly. (Murdock Dep. at 506; Tennyson Dep., at 24.) Such concern for the general fair treatment of Cannon employees cannot be said to rise to the level of assuming discretionary authority over the administration of the Cannon plan.

2. *Fiduciary Duty Under § 1002(21)(A)(i)*

Plaintiffs also contend that Fieldcrest owed them a duty as a fiduciary under 29 U.S.C. § 1002(21)(A)(i) in

that Fieldcrest assumed discretionary authority and control regarding plan management and distribution of plan assets. Plaintiff's [sic] primary contention is that Fieldcrest participated in the selection of the annuity. Through depositions, Murdock and others involved in the stock sale have testified that Fieldcrest had nothing to do with the decision to purchase the annuities, the selection of Executive Life, or the termination of the Cannon plan. (Murdock Dep. at 524-25; Tatom Dep. at 50; Ely Dep. at 35.)

The only evidence that Fieldcrest participated in the selection of Executive Life is in plaintiff's [sic] unsworn answers to interrogatories where it is suggested that Fieldcrest was involved in placing Executive Life on the annuity bid list and promised to give Executive Life preferential treatment. The affidavit of Eric Watts, a principal in the firm whose function it was to market Executive Life's annuities, contradicts the suggestion of any special treatment offered by Fieldcrest. (Watts Aff. para. 9.) Watts' statements are corroborated by the deposition testimony of Steven Schwartz, an employee of First Annuity Corporation. (Schwartz Dep. at 165-66.)

The court is somewhat concerned with a meeting that took place on 19 June 1990 and was attended by representatives of Fieldcrest, Executive Life and Murdock. Plaintiffs assert that this meeting is evidence that Fieldcrest was involved in the selection of Executive Life. Defendants deposed six of the representatives in attendance at the meeting and none of them testified that the selection

of Executive Life as an annuity carrier was discussed.[2] Instead, the meeting focused on administrative matters relating to the communication of information concerning benefits to be paid to Cannon employees. (Wilson Dep. at 15-25; Ellis Dep. at 7-12.) Defendants have also provided testimony of those not present at the 19 June meeting that Fieldcrest helped transmit data regarding benefits of individual Cannon employees and that the 19 June meeting was held in order to facilitate the transmission of such information. (Werner Dep. at 95, 107, 293; Tennyson Dep. at 35.)

Plaintiffs assert that the limited activity of transferring of information is enough to constitute the assumption of a fiduciary duty by Fieldcrest. However, the general rule is that an administrator who merely carries out ministerial duties or processes claims does not exercise discretionary powers and is not an ERISA fiduciary. *See Kyle Rys., Inc. v. Pacific Admin. Servs., Inc.*, 990 F.2d 513 (9th Cir.1993); *Pohl v. National Ben. Consultants, Inc.*, 956 F.2d 126 (7th Cir.1992). As long as the ultimate decision regarding the denial of claims or the eligibility for benefits rests with someone else, the administrator has no fiduciary duty. *See Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288 (11th Cir.1989).

Fieldcrest did assist Cannon in transmitting data concerning former Cannon employees and the amount of benefits owed them; however, there is no evidence that Fieldcrest's involvement went beyond the ministerial task

---

[2] Jim Tatom, Alex Yielding, Steven Schwartz, Charles Wilson, Raven Ellis and Nancy Bateman were the attendees of the meeting that were deposed.

of relaying data. There is no evidence that Fieldcrest ever made determinations of the eligibility of Cannon employees under the old Cannon Plan. Therefore, Fieldcrest did not assume any fiduciary duty with respect to the administration of the Plan.

3. *Successor Liability*

Plaintiff's [sic] Third Amended Complaint alleges that Fieldcrest is a successor to the liabilities of Cannon. As a legal principle, Fieldcrest may be held liable as a result of its merger with Cannon; however, plaintiffs have failed to present to the court any evidence that Cannon was liable under ERISA. The only acts that could possibly form the basis of Cannon's liability, and thereby Fieldcrest's successor liability, are based on the 1979 amendment to the 1976 Cannon Plan. In order to establish Cannon's ERISA liability, plaintiffs must show that Cannon, as the employer at the time of the amendment, breached a fiduciary duty owed to plaintiffs. Employers do not owe plan participants a fiduciary duty when they make business decisions, but only when they take action in their capacity as plan administrators. *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir.1985), *cert. dismissed*, 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986), *overruled on other grounds by Mead Corp. v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989). Many courts have held that an employer does not act as an ERISA fiduciary in deciding to amend or terminate a plan. *See, e.g., Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir.1992); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir.1990). The actions of which plaintiffs complain

were all taken by Cannon in the course of its normal business operation and, therefore, do not subject Cannon to ERISA liability.[3] Logically, therefore, Fieldcrest cannot be subject to successor liability for Cannon's actions.

Plaintiffs have failed to establish a genuine issue of material fact concerning Fieldcrest's responsibilities as a fiduciary under ERISA and the existence of successor liability. As concluded above, Fieldcrest did not assume any fiduciary duty under the meaning given that term in 29 U.S.C. § 1002(21)(A). Further, because Cannon was not liable under ERISA, Fieldcrest cannot be held liable as a successor. Therefore, defendant Fieldcrest is entitled to judgment as a matter of law on all claims against it and Fieldcrest's motion for summary judgment will be allowed.

B. Otto Stolz's Motion for Summary Judgment

Stolz is a former officer and director of Cannon who left the company in May 1982. Plaintiffs claim that Stolz: (1) breached his fiduciary duty under ERISA; (2) violated ERISA's "prohibited transaction" rule; (3) violated ERISA rules relating to the distribution of assets upon plan termination; and (4) violated ERISA rules prohibiting employers from firing or harassing employees to prevent those employees from claiming vested pension rights. The first and third allegations arise out of the 1979 Amendment to Cannon's retirement plan and will be discussed together. The second allegation will be fully

---

[3] This matter is more fully discussed with regard to Otto G. Stolz's motion for summary judgment.

discussed in the portion of this order relating to plaintiffs' claims against defendant Murdock, but will be briefly mentioned below. The fourth claim will be discussed independently below.

1. Breach of Fiduciary Duty

Plaintiffs claim that Stolz was involved in the breach of duties owed them with respect to the allegedly improper 1979 Amendment to the 1976 Plan, the promises made them in the Summary Plan Description (SPD), and in general through his activities as an officer and director of Cannon.

a. Fiduciary Duty Under the 1979 Amendment

Plaintiffs' breach of fiduciary duty claims against Stolz are based on allegations that the terms of the 1976 Plan prohibited the 1979 Amendment to the Plan. Specifically, plaintiffs claim that the 1979 Amendment permitting surplus assets to revert to the sponsor on termination was in violation of Articles 7 through 10 of the 1976 Plan. The provisions of each of these articles must be examined. Article 7 contains several sections relating to Plan contributions and payments. Section 7.2 requires Cannon to make sufficient contributions to pay benefits, but does not address the issue of who would receive any surplus assets. Section 7.3 requires all contributions to be paid into a trust fund unless expressly provided otherwise in the Plan. Section 7.5 states that plan participants have rights only to their benefits and does not give them any rights to any surplus upon termination. This section

serves to protect participants' rights to their benefits and cannot be interpreted to afford them any rights to any surplus.

Section 8.1 of Article 8 sets out the statutory fiduciary duties as articulated in § 404(a)(1) of ERISA and names the fiduciaries.[4] These duties are in no way implicated when a plan sponsor takes possession of surplus assets upon termination. *See Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir.1987). Section 8.3 discussed the Retirement Committee and establishes the administrative duties of this body. Article 9 deals only with contribution and requires all contributions to be paid to the trustee and kept in the trust fund. It also contains language limiting a participant's rights to the Trust Fund to the amount of benefits actually owed that individual. There is simply no language in Article 8 or 9 that would prevent amendment of the Plan to allow the sponsor to receive surplus assets upon termination.

Article 10 contains sections specifically dealing with procedures for amending the Plan. Section 10.1, entitled "Amendment," allows Cannon's Board of Directors to amend the Plan as long as the amendment does not divert assets "to purposes other than for the exclusive benefit of Participants, Eligible Spouses or Beneficiaries" or does not reduce the amount of benefits to which a beneficiary or participant was entitled prior to the effective date of the amendment. Article 10 contains no language prohibiting the 1979 Amendment.

---

[4] Stolz is not named as a fiduciary.

The provision of the 1979 Amendment at issue is found in Section 11.05 of the 1979 Plan and is entitled "Termination Distribution." It is similar to the corresponding provision in the 1976 Plan in that it does not confer upon plan participants the right to any surplus assets upon termination; however, it differs in that § 11.05 specifies that any such surplus will be returned to the company. Plaintiffs have failed to present the court with any facts that the Plan was not amended in accordance with its own terms. The Fourth Circuit has held that abiding by the terms of a plan cannot be a breach of fiduciary duty. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 493 U.S. 919, 110 S.Ct. 281, 107 L.Ed.2d 261 (1989). This change does not have an adverse or prohibited effect on the rights guaranteed to the participants under either the 1976 or 1979 Plan. The 1976 Plan never gave the participants the right to any surplus, so the change in the 1979 Plan giving any such surplus to the company did not serve to take any benefits from the participants.

Plaintiffs contend that the 1976 Plan language, even if it does not specifically prohibit the company from recovering surplus assets, does prohibit such recovery because the Plan was intended to provide benefits for its participants. The Fourth Circuit has held that a plan sponsor may amend a plan to add provisions allowing the company to recover surplus assets even when unambiguous plan language requires all actions to be in the exclusive interest of the beneficiaries. *Wilson*, 819 F.2d at 460. Additionally, the 1976 Plan differs from the one at issue in *Wilson* in that the §§ 7.3, 7.5 and 9.2 make it clear that participants' rights are limited only to the amount of their

accrued benefits and the *Wilson* Plan contained no such language. Plaintiffs' reliance on the "exclusive benefit" language in the 1976 Plan is misplaced in light of Fourth Circuit precedent and opinions from other circuits. *See id.; Chait v. Bernstein,* 835 F.2d 1017 (3rd Cir.1987) (rejecting prohibition of plan amendment based on "exclusive benefit" argument); *Outzen v. FDIC ex rel. State Examiner of Banks,* 948 F.2d 1184 (10th Cir.1991) ("exclusive benefit" language does not prohibit reversion of surplus assets to sponsor).

b. Fiduciary Duty under the SPD

Plaintiffs also claim that the 1979 amendment was improper in that it was contrary to representations made to them in the 1976 SPD indicating that assets would be distributed only for their benefit.[5] Provisions contained in a SPD are not binding on an ERISA sponsor and cannot serve to amend a plan in any way. *See Elmore v. Cone Mills Corp.,* 23 F.3d 855 (4th Cir.1994) (en banc) (promised benefits are incorporated in a plan only after formal amendment procedures followed). However, if a SPD contains language inconsistent with that of a plan and a participant detrimentally relies on the promises of the SPD, the courts have recognized a federal common-law cause of action. *Aiken v. Policy Management Sys. Corp.,* 13 F.3d 138 (4th Cir.1993). In *Aiken,* plaintiff claimed the

---

[5] Stolz maintains that he had no involvement at all in the preparation of the 1976 SPD, as it was prepared and distributed before he went to work at Cannon. (Stolz Aff. para. 5.) However, in an effort to fully address plaintiffs' allegations, the claims against Stolz as they relate to the SPD will be fully discussed.

right to a distribution based on SPD statements and defendant alleged it had the right to withhold the payment until plaintiff reached a certain age. The court held that in order to recover, plaintiff had to show significant reliance upon or prejudice caused by the SPD. *Id.* at 141; *see also Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1062, 127 L.Ed.2d 382 (1994) (participant may only receive benefits based on SPD if can show reliance on SPD language and prejudice); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1442, 131 L.Ed.2d 321 (1995) (court will not infer detrimental reliance or prejudice without affirmative evidence).

Plaintiffs have failed to show the court any reliance upon the 1976 SPD. Plaintiff Johnsie Riley admitted that she read only parts of the SPD, cannot remember the details of the SPD, and did nothing differently as a result of reading it. (Johnsie Riley Dep. at 28, 133-34.) Her husband stated that he never read the booklet containing the 1976 SPD. (John Riley Dep. at 13.) Virginia Harrington testified that she real [sic] only "part" of the 1976 SPD (V. Harrington Dep. at 13), and her husband, Dewey Harrington said that he "didn't ever look at" the SPD. (D. Harrington Dep. at 21.) By their own admissions, plaintiffs have failed to prove reliance, an essential element of their claim based on the SPD language. Therefore, defendant Stolz's motion for summary judgment on this claim must be allowed. *See EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir.1992) (affirming summary judgment where plaintiff failed to produce evidence, court relied on plaintiffs' admissions that they could not offer evidence to support element of claim).

c. Fiduciary Duty as a Director and Officer

Plaintiffs assert that Stolz was a fiduciary under ERISA, thereby owing a fiduciary duty to them, simply because he was an officer and director of Cannon. The Fourth Circuit has held that "fiduciary status is not an all-or-nothing concept." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir.1992) *cert. denied*, ___ U.S. ___, 113 S.Ct. 1051, 122 L.Ed.2d 359 (1993). The facts of this case, indicated that Stolz was a fiduciary for limited purposes, none of which are relevant to plaintiffs' claims.

The ERISA definition of fiduciary as set out in the discussion of defendant Fieldcrest's motion applies equally to defendant Stolz. *See* 29 U.S.C. § 1002(21)(A). The Fourth Circuit has said that plan documents are the place to look in order to determine the discretionary authority and responsibility given to board members. *Coleman*, 969 F.2d at 61. The Court of Appeals continued to explain that one should also look "beyond the formalities to see if [the alleged fiduciary] in fact exercised authority" such that he was acting as a fiduciary. *Id.* Looking first to the Plan's language, the only duty given to the board was that of appointing members of the Retirement Committee. Stolz has stated that his involvement with respect to the Plan was limited to voting for Retirement Committee members and there has been no evidence suggesting otherwise. Stolz was never on the Retirement Committee himself and there are no facts indicating that he exercised any authority or control respecting the management or disposition of the Plan, nor was he ever involved in the administration of the Plan.

Plaintiffs' contention that Stolz assumed an expanded fiduciary role simply due to his status as an officer and director is without merit. As the Fourth Circuit stated, the extent of a fiduciary's role is to be gleaned from plan-related documents. *Id.* The Third Circuit has specifically held that one's position within a company does not create a fiduciary duty. *See Confer v. Custom Eng. Co.*, 952 F.2d 41 (3rd Cir.1991). This position is also supported by commentary found in the Code of Federal Regulations where it states that members of the board of directors and those holding office in a company are fiduciaries only to the extent that they have responsibility for the acts described in the statute. 29 C.F.R. § 2509.75-8 (D-4, D-5) (1994).

Stolz, admittedly, was a fiduciary for the limited purpose of selecting members of the Retirement Committee. However, there is no evidence that he breached this duty. Stolz's motion with respect to the breach of fiduciary duty claim will be allowed.

2. *Conspiracy Claim Against Stolz*

Plaintiffs claim that Stolz and other Cannon directors conspired to breach fiduciary duties under ERISA. The Supreme Court has described ERISA as a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), and nowhere does it provide for a conspiracy cause of action. In a recent case, the Court cast doubt on the availability of a conspiracy claim under ERISA. *See Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). In that case, the court rejected a claim against an actuarial firm that allegedly aided and abetted

a breach of fiduciary duty stating that it was unwilling "to infer causes of action in the ERISA context, since that statute's carefully and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Id.*, ___ U.S. at ___, 113 S.Ct. at 2067 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985)) (emphasis in original).

Applying the reasoning of *Mertens*, plaintiffs cannot make a claim for conspiracy under ERISA. The statute does not prohibit anyone from "conspiring" with a fiduciary for any purpose, just as it does not prohibit "aiding and abetting" the breach of a duty. *See Reich v. Rowe*, 20 F.3d 25 (1st Cir.1994) (no cause of action against non-fiduciary who knowingly participated in breach of ERISA fiduciary).

Even if the court were to infer a conspiracy cause of action within ERISA, plaintiffs have failed to establish facts to support a conspiracy. To state a claim for conspiracy a plaintiff must establish: (1) an agreement between two or more people to participate in an unlawful act or a lawful act in an unlawful manner; (2) an unlawful overt act by a party to the agreement that is in furtherance of the agreement; and, (3) damages. *Davenport v. North Carolina Dept. of Transportation*, 3 F.3d 89 (4th Cir.1993). When asked to provide factual data supporting the existence of a conspiracy, plaintiffs responded with conclusory responses that showed nothing. Stolz, however, has stated that as of the time of the 1979 Amendment, he had never heard of Murdock and had never discussed the retirement plan. (Stolz Aff. para. 8, 9.) As well, it is

undisputed that Stolz left Cannon in May 1982 and was not involved in or aware of the decision to terminate the Plan or to select Executive Life as an annuity provider. The law is clear that mere allegations of a conspiracy do not establish a claim and are insufficient to overcome a motion for summary judgment based on testimony evidencing a lack of participation. *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987) (quoting *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir.1985)). Defendant Stolz's motion for summary judgment on the conspiracy claim will be allowed.

3. *Interference With Employment Relationship Claim*

Plaintiff's [sic] final claim against Stoltz [sic] is that his actions relating to the amendment of the Plan violated § 510 of ERISA which prohibits the firing or harassing employees to prevent them from claiming vested pension rights. Section 510 is relevant in situations where there is an allegation that "an employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way." *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir.1990). Plaintiffs have not offered the court any evidence that Stolz interfered with the employer-employee relationship between Cannon and Plan participants, or that any of his actions resulted in a change in this relationship. Section 510 has been interpreted as a safeguard of the employment relationship that gives rise to an employee's individual rights. *See West v. Butler*, 621 F.2d 240 (6th Cir.1980);

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). As a matter of law, this section does not apply to the facts established in this case and Stolz's motion with respect to this claim will be allowed.

C. The Directors' Motion for Summary Judgment

Plaintiffs' claims against the Directors are very similar to those made against Stolz and much of the discussion concerning Stolz's motion for summary judgment applies equally to the motion of the Directors. Specifically, plaintiffs' claim that the Directors were fiduciaries merely because of the position they held is without merit for the reasons discussed in reference to the same claim made against Stolz. Plaintiffs have failed to provide the court with any evidence that any of the Directors exercised any discretionary control or authority over the administration of the Plan such that their roles as Directors extended into that of fiduciary. As was Stolz, the Directors were fiduciaries for the limited purpose of electing members of the Retirement Committee,[6] and plaintiffs have not shown that the Directors took any action in breach of this duty.

Plaintiffs further contend that the Directors' power to amend or terminate the Plan made them fiduciaries. The Fourth Circuit, however, has held that the ability to alter or terminate a plan is not to be reviewed by fiduciary

---

[6] Director Batte was a member of the Retirement Committee and plaintiffs' claims against him in that capacity will be addressed elsewhere in this Order.

standards. *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 411 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). Several other circuits are in agreement. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir.1990); *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.1988); *cert. denied*, 488 U.S. 981, 109 S.Ct. 529, 102 L.Ed.2d 561 (1988); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir.1987); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418 (9th Cir.1986). Also, the Ninth Circuit has already reviewed the Plan at issue in this case in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir.1988) (*ACTWU*), and the amendment, termination and reversion of surplus assets were all determined to be in compliance with ERISA. Thus, in following the terms of the Plan, the Directors were not in violation of ERISA, and the Directors' motion for summary judgment as to the breach of fiduciary duty claims will be allowed.

The discussion in the section of this Order resolving Stolz's motion for summary judgment on plaintiffs' allegations that the 1979 Amendment to the 1976 Plan was a breach of fiduciary duty and the Plan itself is fully relevant to the same claims made against the Directors. For the reasons stated above, the court is of the opinion that the amendment was not in violation of ERISA or its own terms. Additionally, the court's reasoning relating to plaintiffs' claims that the SPD gave them additional rights and created fiduciary duties owed them by Stolz also applies to the same claims against the Directors.

Plaintiffs allege that the Directors were part of a conspiracy to deprive them of benefits and also violated § 510 of ERISA. For the reasons articulated in the discussion of the similar claims as they relate to Stolz, the Directors' motion for summary judgment will be allowed with respect to the conspiracy and interference with the employment relationship claims.

Because Director George A. Batte, Jr. (Batte) was also a member of the Retirement Committee, the claims against him warrant independent discussion. The minutes of the 30 April 1979 Retirement Committee meeting reveal that Batte was on the Committee.[7] No other records indicate his committee service prior to that date. Batte left Cannon in 1982. The dates are important to note because plaintiffs' allegations of any wrongdoing relating to the Retirement Committee stem from committee actions taken after Batte left Cannon. While Batte may have had additional fiduciary duties during the time he served on the Retirement Committee, plaintiffs have failed to allege or prove that he took any action in violation of such duties.

D. Murdock's Motion for Summary Judgment

Plaintiffs' claim [sic] against Murdock are similar to those lodged against the other defendants and include breach of fiduciary duty in amending the Plan, in terminating the Plan, in selecting Executive Life as the annuity

---

[7] Batte has no independent recollection of serving on the Retirement Committee; however, he did not deny that he could have served on the Committee at some point in time.

carrier and claiming the surplus assets; conspiracy; prohibited transactions under ERISA and interference with the employer-employee relationship. Although the claims are similar, some facts apply to Murdock's involvement with the Plan that were not relevant to other defendants and a brief recitation of them will facilitate discussion.

Murdock first bought stock in Cannon in 1980 and acquired a controlling interest in March 1982. At that time he became Chief Executive Officer and served in that capacity until January 1986. During these years he was also the sole shareholder of Cannon Holding Corporation (CHC), Cannon's parent company.

In November 1985 Fieldcrest expressed interest in acquiring Cannon and the sale was completed on 30 January 1986. Fieldcrest has made it clear from the beginning that it had no desire to purchase Cannon's retirement plan and the Plan was not part of the sale. As a result, the decision was made to terminate the Plan. To facilitate termination, the Plan was amended with the changing of the sponsor from Cannon to CHC, which Murdock would still control after the sale. The Plan was also amended to provide for the reversion of all surplus assets to the sponsor.

As Plan sponsor, CHC, through Murdock, was responsible for distribution of Plan assets. CHC formed a Retirement Committee (the Committee) to oversee asset distribution. The Committee members were Michael Werner, James Tatom, Michael Halpern and Raymond Henze. They, with the assistance of the law firm of O'Melveny and Myers and the actuarial firm of Hewitt and Associates, had the responsibility of assuring that all

participants would receive full benefits. After several rounds of bidding and financial stability reviews, Executive Life was chosen as the annuity carrier. Executive Life administered the annuity without incident until it was placed in conservatorship in 1991. Plaintiffs have testified that they have received all benefits owed them by the Plan. (Johnsie Riley Dep. at 54; John Riley Dep. at 35-36; V. Harrington Dep. at 50-51; D. Harrington Dept. [sic] at 28-29.)

1. Res Judicata

Murdock was a named defendant in *ACTWU*, a case filed by the Union and individual former Cannon employees and Plan participants. The complaint sought relief for all Plan participants and alleges breach of fiduciary duty in management, amendment and termination of the Plan. Defendant Murdock alleges that disposition of *ACTWU* operates to invoke the doctrine of res judicata and bar plaintiffs' claims against him.[8]

---

[8] Defendant Fieldcrest was also involved in the *ACTWU* suit and argued res judicata and collateral estoppel as grounds for dismissal at the pleading stage of the instant action. In its Order of 30 July 1993, the court concluded that the issues raised in *ACTWU* and those presented in this action, as they relate to Fieldcrest, were not identical. Relying on the "issue preclusion" analysis of *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir.1992), the court held that collateral estoppel did not apply. The res judicata argument now raised by Murdock focuses on the similarity of the claims and parties rather than the issues and is a separate and distinct argument from that rejected in the earliest Order.

For res judicata to apply, three elements must be proven: "(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits." *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir.), *cert. denied*, 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990) (quoting *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.1981)). Addressing the first element, Murdock is correct in his assertion that the settlement and voluntary dismissal of *ACTWU* on remand from the Ninth Circuit was a final judgment on the merits for the purposes of the first element of res judicata. *See id.*, 900 F.2d at 740.

Turning to the second element, the causes of action in *ACTWU* and the instant case are not identical. Where the elements of claims differ, there are two causes of action and litigation of one will not preclude litigation of the other. *United States v. Tatum*, 943 F.2d 370, 381 (4th Cir.1991). This court has previously held that *ACTWU* involved claims which related to facts that did not take place at the same time as those involved in the case at bar. *Riley v. Murdock*, 828 F.Supp. 1215, 1222-23 (E.D.N.C.1993). Specifically, the *ACTWU* plaintiffs did not file claims relating to the surplus prior to 1979, the 1979 Plan amendment, the language of the 1976 and 1979 SPD's, allegedly prohibited transactions under ERISA, the selection of Executive Life, or the allocation of surplus assets at termination.

Examining the third and final element of res judicata requires looking at the identity of the parties and their privies in both suits. Murdock admits, and the plaintiffs have stated, that they were not plaintiffs in *ACTWU* and

were not members of the union that filed that suit. Therefore, the focus shifts to the relationship between the *ACTWU* plaintiffs and those here. This court held, in its previous order, that the plaintiffs in the instant case "are not so closely aligned with plaintiffs in *ACTWU* as to justify precluding this litigation." *Id.*, 828 F.Supp. at 1223. Relying on this earlier decision, the court finds that there is no privity between the two groups of plaintiffs so as to satisfy the third element of res judicata. Because only one of the three necessary elements of res judicata are present in this case, that doctrine will not apply to bar this action against Murdock and the discussion will proceed to the merits.

2. *Breach of Fiduciary Duty*

Plaintiffs have alleged that Murdock breached the fiduciary duties owed by the role he played in several events. Each event will be examined separately.

a. Purchase of the Executive Life Annuity

The heart of plaintiffs' allegations against Murdock are that the purchase of the group annuity contract from Executive Life in 1986 constituted a breach of fiduciary duty. Murdock was a fiduciary under ERISA, and the duties of a fiduciary are established in 29 U.S.C. § 1104, which provides, in pertinent part:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

> (A) for the exclusive purpose of:
>
> (i) providing benefits to participate [sic] and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . [9] [and]
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Plaintiffs claim Murdock violated the "exclusive purpose" requirement, the "prudence" requirement, and the "in accordance with the plan" requirement. Each requirement will be examined in turn.

Courts have articulated two way [sic] in which to measure a fiduciary's use of prudence in carrying out their duties. The first is whether the fiduciary employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation. *See Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487 (8th Cir.1988); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir.1983), *cert. denied*, 464 U.S.

---

[9] Part C of this statute requiring diversification is not at issue in the instant case.

1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984); *Bidwell v. Garvey*, 743 F.Supp. 393 (D.Md.1990).

In determining if the appropriate investigation was conducted, courts often focus on whether the fiduciary obtained assistance from experts. *See Donovan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984) ("ERISA fiduciaries need not become experts . . . [as] they are entitled to rely on the expertise of others.") From this point, the court's inquiry shifts to whether the fiduciary's decision was reasonable at the time it was made in light of the results of the investigation. This test is not one of hindsight and facts taking place after the decision was made will not render a decision imprudent. In a case out of the Eleventh Circuit where the fiduciaries' decision to develop plan-owned property turned out to be a bad one, the court made it clear that it had the duty to inquire whether the fiduciaries "at the time they engaged in the challenged transaction, employed the appropriate methods to investigate and/or structure the investment." *Donovan v. Walton*, 609 F.Supp. 1221, 1228 (S.D.Fla.1985), *aff'd sub nom., Brock v. Walton*, 794 F.2d 586 (11th Cir.1986).

Applying these measures of prudence to Murdock's decision to purchase the Executive Life annuity, it is clear that the decision was well-investigated and reasonable at the time it was made. It is undisputed that as soon as termination of the Plan was decided upon, a committee of experienced financial managers was formed and charged with the responsibility of evaluating potential carriers and selecting the one they felt to be the best. This committee, as explained elsewhere in this Order, retained

Hewitt Associates, a leading employee benefits consulting firm, and began going through a list of the top-rated insurance companies. (Werner Dep. at 140.) The committee also retained a law firm and conducted its own investigation of each insurance company that bid on the annuity contract. This investigation included: (1) a financial analysis; (2) personal contact with the companies' senior management; (3) a review of financial statements, quarterly reports and other relevant financial documents (Werner Dep. at 102-03, 160; Tatum Dep. at 41, 47); (4) consultation with Conning & Company, a firm specializing in the evaluation of insurance companies (Werner Dep. at 150-51); (5) consulting with independent sources about Executive Life; and, (6) consulting with other companies that had bought annuity contracts from Executive Life. The committee also relied on the fact that Executive Life had received a high rating in 1986 from A.M. Best, the preeminent authority rating insurance companies. (Thrower Dep. at 26, 44-45, 65, Ex. 21.) The committee also knew that Executive Life received a AAA rating from Standard & Poor's, the highest rating that company gives, and the stock of its parent company was also highly rated. (*Id.* Ex. 69.) The committee also made certain that Executive Life had the administrative capabilities to oversee disbursement of Plan funds. (Werner Dep. at 175-77).

All of these efforts establish that Murdock and his committee thoroughly investigated the purchase of the annuity from Executive Life and that the decision to purchase was reasonable based on the results of that investigation. Plaintiffs rely on the assertions of their expert that Murdock should have known in 1986 that there were problems at Executive Life which would lead

to its receivership in 1991. (Babbel Dep. at 73, 75.) However, the mere conclusory opinion of an expert, when not supported by evidence, will not defeat summary judgment. *Tyger Constr. Co., Inc. v. Pensacola Construction Co.*, 29 F.3d 137 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995); *Eastern Auto Distribs., Inc. v. Peugeot Motors of Am.*, 795 F.2d 329 (4th Cir.1986). Plaintiffs have not offered any evidence to support the opinion that Murdock and the committee should have known of any problems at Executive Life in 1986. Therefore, the purchase of the Executive Life annuity was prudent.

Plaintiffs claim that Murdock violated another requirement imposed upon an ERISA fiduciary in that he did not follow what is known as the "exclusive purpose" clause. Examining the "exclusive purpose" requirement under ERISA's outline of fiduciary duties, it is clear that the statute imposes a loyalty to plan participants and beneficiaries. However, the legislative history of the statute suggests that Congress intended a fiduciary to be able to meet the "exclusive purpose" requirement by satisfying the prudence requirement. H.R.Conf.Rep. No. 1280, 93rd Cong., 2nd Sess.1974, *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5083. Additionally, courts have held that a fiduciaries' decision based on the advice of retained experts did not violate the duty of loyalty. *See Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982). Murdock acted for the exclusive purpose of Plan participants and beneficiaries when he prudently selected to purchase the annuity from Executive Life.

The third requirement mandates that a fiduciary administer a plan in accordance with plan documents, unless doing so would violate ERISA. Section 1408 of the Plan, as amended, allocated administrative responsibilities to the Sponsoring Committee, the Retirement Committee, the Trustee, and the Investment Committee. Murdock was not a member of any of these committees, was not the Trustee, and there are no facts to suggest that he participated in Plan administration. However, even if it were determined that he participated in Plan administration, he would not be liable because of such participation because the Plan was administered in accordance with its terms. The Plan in effect when Murdock took control provided for the reversion of surplus assets to the Plan sponsor upon termination. (1979 Plan § 11.05.) The Committee had to transfer the surplus assets to Murdock when the Plan was terminated in 1986 or else be liable for an ERISA violation. Thus, Murdock cannot be held liable on this basis.

b. The 1985 Plan Amendment and Termination

In 1985, the Plan was amended to change the name of the sponsor from Cannon to CHC. The amendment also eliminated the phrase "due to erroneous actuarial computation" in reference to the reversion of surplus assets. Several courts have considered this phrase to be boilerplate language and have held that it does not require that surplus assets be the result of an identifiable mistake, but allows any assets remaining after all plan liabilities are satisfied to labeled [sic] the result of actuarial error. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848

F.2d 1164 (11th Cir.1988); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America v. Dyneer Corp.*, 747 F.2d 335 (6th Cir.1984); *See* Rev.Rul. 83-52, 1983-13 C.B. 87. Thus, the elimination of the phrase concerning actuarial computation was not a material change and had no effect on the benefits owed plaintiffs. The change of the sponsor was also an incidental change with no effect on the participants or beneficiaries. Neither of these amendments form the basis of a breach of fiduciary duty claim.

Plaintiffs contend that the termination of the Plan was a breach of fiduciary duty; yet, several circuits have held that termination of plans are not evaluated under fiduciary standards. *Hozier*, 908 F.2d at 1155; *Musto v. Am. General Corp.*, 861 F.2d 897 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989). In fact, the Ninth Circuit has made this determination about the very plan at issue in this case. *ACTWU*, 861 F.2d at 1419. The Fourth Circuit has not decided a case involving the application of fiduciary standards to termination of a plan, but it has heard a case involving fiduciary standards, renegotiation and amendment of a plan. In *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 411 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), the court stated that Congress did not prohibit "an employer who is a fiduciary from exercising the right accorded other employers to renegotiate or amend [plan terms]. . . . The changes, accomplished in this manner, are not to be reviewed by fiduciary standards." Termination of a plan is similar to the changes in *Sutton* and, therefore, the decision to terminate should not be evaluated under fiduciary standards. Because the

decision to terminate is not evaluated under fiduciary standards, there can be no claim of breach of fiduciary duty with respect to that action.

c. Allocation of Surplus Assets

Plaintiffs claim that Murdock and the other defendants[10] violated 29 U.S.C. § 1344 and breached their fiduciary duties by turning over the surplus assets of the Plan to Murdock. Title 29 U.S.C. § 1104, discussed in detail above, outlines fiduciary duties and specifically references § 1344, which deals with plan termination. Section 1104 allows plan assets to "inure to the benefit of" the employer, as provided in § 1344. By definition, any allocation of plan assets which complies with § 1344 cannot be a breach of fiduciary duty. The only issue then is whether payment of the surplus to Murdock was in compliance with § 1344.

Section 1344(d)(1) allows for the reversion of surplus assets to the employer, if a plan so provides. There is no dispute that the Plan provides such a reversion and plaintiffs have failed to present any evidence that any defendant did not distribute the Plan assets in compliance with the statute and the Plan. In fact, the only evidence relating to the disbursement of assets indicates that everything was done properly. Application was made to the

---

[10] This claim is made against all defendants, but is discussed in reference to Murdock's motion because the claim centers around the theory that the payment of the surplus assets to him was the violation. This discussion should apply to the motions of the other defendants as well.

Pension Benefits Guaranty Corporation (PBGC)[11] for a Notice of Sufficiency regarding the termination of the Plan. PBGC then questioned Hewitt, the actuarial firm calculating asset distribution, about the allocation of assets between the sponsor and the participants. The allocation was done in compliance with PBGC regulations and all eligible Plan members received a pro rata share of the surplus, with the remainder going to the sponsor. *See* 29 C.F.R. §§ 2618.30, 2618.31. Ultimately, the PBGC issued a Notice of Sufficiency, signifying its approval of the asset allocation. The only evidence plaintiffs offered to counter these facts is the statement of an expert confirming that the method used to calculate the allocation is the "preferred" method. The surplus assets were not distributed in violation of § 1344 and the distribution was not a breach of fiduciary duty. Defendants' motions relating to this claim will be allowed.

3. Conspiracy to Violate ERISA

Plaintiff's [sic] contend that Murdock conspired with the Cannon Board of Directors to pass the 1979 Amendment allowing any surplus assets to revert to the Plan sponsor. All facts indicate, however, that Murdock had no contact with Cannon prior to 1980 and did not have a controlling interest until March 1982. In fact, individuals who were either officers or directors of Cannon during 1979 have sworn that they never spoke with Murdock or his associates prior to February 1980. (Adams Dep. at

---

[11] The PBGC is the federal agency responsible for regulating and overseeing qualified pension plans.

65-66; Stoltz [sic] Dep. at 24-25.) Murdock himself has stated that he was not part of any such conspiracy and was attracted to Cannon because of its vast real estate holdings and knew little, if anything, about its retirement trust. (Murdock Dep. at 34.) Plaintiffs have failed to produce any facts in support of Murdock's involvement with the 1979 Amendment. Further, as stated above in relation to plaintiffs' claims against several other defendants, the Supreme Court has cast serious doubt on the existence of a conspiracy cause of action under ERISA. *Mertens*, ___ U.S. at ___, 113 S.Ct. at 2063 (1993). For these reasons, Murdock's motion for summary judgment on any conspiracy claim will be allowed.

4. Prohibited Transaction Claim

Plaintiffs make this claim against several defendants, including Murdock, and it is discussed here because the factual basis of the claim is that the purchase of the Executive Life annuity, which took place under Murdock's leadership, was a violation of 29 U.S.C. § 1106. That statutes [sic] prohibits fiduciaries from taking part in certain specified transactions involving assets of a plan and the Fourth Circuit has written that "Congress enacted a prohibited transaction rule to prevent persons with a close relationship to a plan from using that relationship to the detriment of the plan beneficiaries." *Wood v. Commissioner*, 955 F.2d 908, 910 (4th Cir.1992). Examining the language of § 1106, it is clear that a prohibited transaction must involve a plan and a "party in interest." Under plaintiffs' scenario, the only entity involved, other than the Plan itself, is Executive Life. Executive Life

cannot be said to be a party in interest, as it had no interest in the Plan prior to it being awarded the annuity contract. In a case similar to the one at bar, the Ninth Circuit held that the purchase of a group annuity as a part of plan termination was not the type of transaction intended to be prohibited by this statute. *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir.1994). Defendants' motion on this claim will be allowed.

5. Interference With Employment Relations Claim

This claim was also made against other defendants and is completely discussed in relation to defendant Stolz. That discussion applies equally to defendant Murdock, as plaintiffs have failed to present any evidence that their employment relationship was changed in any way due to his actions. Murdock's motion with respect to this claim will be allowed.

III. CONCLUSION

For the reasons herein stated, the motions for summary judgment filed by Fieldcrest, Stolz, the Directors, and Murdock are ALLOWED and this matter is DISMISSED. Plaintiffs' motion for class certification is hereby rendered MOOT.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 28, 1996

No. 95-2414
CA-92-442-5-BR

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similarly situated

Plaintiffs – Appellants

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION; CABARRUS BANK & TRUST COMPANY, Trustee

Defendants – Appellees

and

FIELDCREST CANNON MILLS, INCORPORATED; CHARLES A. CANNON, Charitable Trust Number One; CHARLES A. CANNON, Charitable Trust Number Two; CHARLES A. CANNON, Charitable Trust Number Three; CANNON FOUNDATION, INCORPORATED; TRUST UNDER THE WILL OF CHARLES A. CANNON; WILLIAM C. CANNON, Estate of the foregoing, individually and as a trustee; GEORGE A. BATTE, JR., individually and as a trustee; J. HARRIS CANNON, individually and as a trustee; OTTO G. STOLZ, individually and as a trustee; HAROLD P. HORNADAY; DONALD S. HOLT, Estate of the foregoing; ANDREW W. ADAMS; ALBERT

M. ALLRAN; JOSEPH C. RIDENHOUR; HUBERT J. TOUMEY; JAMES R. JOLLY; FIRST UNION NATIONAL BANK, Trustee

Defendants

SECRETARY OF LABOR

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
OCT 3 1996
CLERK

No. 96-324

In The

Supreme Court of the United States

October Term, 1995

JOHNSIE RILEY, et al.,

Petitioners,

v.

DAVID H. MURDOCK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT MURDOCK'S BRIEF IN OPPOSITION

RALPH M. STOCKTON, JR.
Counsel of Record
RODRICK J. ENNS
WILLIAM E. WRIGHT
PETREE STOCKTON, L.L.P.
1001 West Fourth Street
Winston-Salem, NC 27101
(910) 607-7300

Attorneys for David H. Murdock

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are identified in the caption. Respondent David H. Murdock, who is the only respondent before this Court, is a natural person, and therefore no statement of parent or subsidiary companies is necessary or appropriate under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 11

REASONS FOR DENYING THE WRIT 13

I. The Opinion Below Creates No Conflict Among The Circuits .....

A. The Decision Below Applied The Same Settled Legal Principles As Are Recognized In *Unisys*, But To A Different Factual Record 14

1. The Committee Conducted The Independent Investigation Missing In *Unisys* 15

2. The Negative Information Available To Unisys Fiduciaries Did Not Exist In 1986 16

3. The Fiduciaries In *Unisys* Failed To Follow The Recommendation Of Their Experts 17

4. The Bid Process In *Unisys* Was Improper 17

5. The Purchase Of GICs In *Unisys* Involved A Continuing Duty To Monitor That Did Not Exist In This Case .. 18

B. The Decision Below Is Consistent With That Of The Ninth Circuit In *Pilkington* 19

TABLE OF CONTENTS – Continued

Page

1. The Bid Process In *Pilkington* Was Not Independent 19
2. Revlon Failed To Make An Independent Investigation Of The Insurance Companies 20
3. Executive Life's Bid In *Pilkington* Was Substantially Below All Other Bids 20
4. Revlon Had A Quid Pro Quo Relationship With Executive Life 21

C. The Fourth Circuit's Decision Does Not Conflict With Those Of Other Circuits In Any Other Respect 22

1. The Selection Of Executive Life Did Not Violate The Diversification Requirement 22
2. The Fourth Circuit's Decision Does Not Conflict With That Of Any Other Circuit Regarding Breach Of Fiduciary Duty Under ERISA 23

D. Conclusion With Respect To Alleged Breach Of Fiduciary Duty 24

II. The Disposition Below In No Way Departed From The Accepted And Usual Course Of Proceedings 24

A. Plaintiffs Presented No Evidence Of Genuine Issues Of Material Fact 24

B. The Department Of Labor's Interpretation Of ERISA Is Irrelevant To This Case 27

III. This Case Is Particularly Ill-Suited For Review On Certiorari Because Plaintiffs' Claims Should Be Barred By *Res Judicata* 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Amalgamated Clothing & Textile Worker's Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988) 28

American Key Corp. v. Cole National Corp., 762 F.2d 1569 (11th Cir. 1985) 26

Anderson v. Mortell, 722 F. Supp. 462 (N.D. Ill. 1989) 20

Bidwell v. Garvey, 743 F. Supp. 393 (D. Md. 1990) 14

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) 27

Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250 (3d Cir. 1978) 28

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982) 20

Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984) 14

Donovan v. Walton, 609 F. Supp. 1221 (S.D. Fla. 1985), *affirmed*, 794 F.2d 586 (11th Cir. 1986) 20

Etter v. J. Pease Construction Co., Inc., 963 F.2d 1005 (7th Cir. 1992) 22

Hayes v. United States, 899 F.2d 438 (5th Cir. 1990) 24

Hughes v. Heyl & Patterson, 647 F.2d 452 (4th Cir. 1981) 28

In re Unisys Savings Plan Litigation, 74 F.3d 420, *reh'g denied*, 74 F.3d 433 (3d Cir.), *petition for cert. filed*, No. 95-1808 (May 6, 1996) 13, 14, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Johnston v. Holiday Inns, Inc., 595 F.2d 890 (1st Cir. 1979) 24

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) 27

M & M Medical Supplies v. Pleasant Valley Hospital, Inc., 981 F.2d 160 (4th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2962, 125 L.Ed.2d 662 (1993) ..26, 27

Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977) 26

Mid-State Fertilizer Co. v. Exchange National Bank of Chicago, 877 F.2d 1333 (7th Cir. 1989) 25, 27

Pilkington PLC v. Perlman, 72 F.3d 1396 (9th Cir. 1995) 13, 14, 19, 20, 21, 22

Retail, Wholesale and Department Store Union v. N.L.R.B, 466 F.2d 380 (D.C. Cir. 1972) 28

Schaefer v. Arkansas Medical Soc., 853 F.2d 1487 (8th Cir. 1988) 14

Tyger Construction Corp., Inc. v. Pensacola Construction Co., 29 F.3d 137 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995) 25, 27

STATUTES AND RULES

ERISA § 404(a)(1)(C) 22

Rule 56(e), F.R.Civ.P. 26, 27

OTHER AUTHORITY

H.R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5084-85 22

RESPONDENT MURDOCK'S BRIEF IN OPPOSITION

Respondent David H. Murdock ("Murdock") respectfully requests that the Court deny the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

Petitioners (hereinafter "Plaintiffs") list the supposed "facts" which they say were sufficient to create a "triable issue" as to whether Murdock "conduct[ed] an inadequate investigation and select[ed] an inappropriate carrier" to provide the annuity upon termination of the Cannon Plan. Petition at 3. In every case, these purported "facts" are based on a distortion or an outright misrepresentation of the record. The following discussion of the most prominent of Plaintiffs' assertions demonstrates the manifest correctness of the District Court's conclusion, unanimously affirmed *per curiam* by the Fourth Circuit, that the record does not support Plaintiffs' rhetoric.

- When Executive Life was placed in receivership in 1981, "Plan participants' retirement benefits were immediately slashed by 30 percent." Petition at 2-3.

There is no dispute that this was a temporary shortfall which was promptly made up. JA 1054.[1] Every Plaintiff testified that they have received every dollar of benefits to which they are entitled. JA 1478-80, 1491, 1723-26, 1735.

---

[1] References are to the Joint Appendix which was filed with the Fourth Circuit.

- A.M. Best reported negative information about Executive Life, including that its reserves were likely underestimated and that it was ranked as only a Class IX insurer, citing JA 456-58. Petition at 4.

The record is undisputed that in making this assertion, Plaintiffs' expert was relying on the *1986* Best report, JA 456, which was not issued until July, 1986, and which therefore could not have been available to Murdock and the Committee when they were conducting the selection process in April through June. Murdock and the Committee had access to the *1985* Best report, JA 1001, which gave Executive Life a rating of A+, Best's highest rating, and placed it in Class XV, Best's largest size category.

- "Murdock knew that the New York Commissioner of Insurance had disqualified Executive Life's parent company from doing business in New York. (JA 1639)." Petition at 4.

The record is again uncontradicted that the first public knowledge of any adverse action by the New York Department of Insurance was in 1987. Indeed, Plaintiffs' own expert prepared a report which indicates that the first public disclosure of any regulatory action in New York was on 4/29/87, JA 491, more than nine months *after* Murdock's decision to purchase an annuity from Executive Life.

- "The California Insurance Commissioner had determined that Executive Life was statutorily insolvent in 1984. (JA 300-332, 435, 456)." Petition at 4.

The reference is to a report by the California Department of Insurance as of year end 1983. JA 300. The report addressed a technical issue concerning how Executive Life accounts for the impact of reinsurance arrangements

on its statutory reserves, and concluded that they were not correctly reported under California law. JA 312-13. While this determination perhaps *could* have resulted in a disallowance of reinsurance credits which might have rendered Executive Life technically insolvent, in fact the California Department of Insurance took no such action. Executive Life agreed to "an orderly accounting transition acceptable to the Department," as a result of which the Department determined that "no reinsurance credits will be disallowed for purposes of this examination report." JA 314. In short, the undisputed record makes clear that this was purely a technical issue, and that Executive Life was never insolvent.

- "Hewitt Associates did not recommend purchasing an annuity from Executive Life, but instead provided a written report to Murdock's Investment Committee which expressed 'reservations' about Executive Life. . . . (JA 266, 267-270, 278-280, 1387-94, 1582-1583, 1588-89, 2043-45)." Petition at 5.

The record says only that Hewitt did not specifically recommend any *one* carrier over another, "in keeping with the usual practice of Hewitt." JA 2045. There is no dispute, however, that the Committee asked for a list of carriers that Hewitt would "recommend," JA 923, and Hewitt responded with a list of eleven "suggested carriers," including Executive Life. JA 933-34.

The so-called "reservations" were contained in a single four page memo, JA 267-270, prepared by an individual Hewitt analyst for another client. The memo began by discussing Executive Life's *strengths*, including at least eleven positive considerations about its stability, financial

strength, exceptional investment performance, and diversification. JA 267-68. Only then did the author of the memo note four "potential negatives" which were "worth monitoring." JA 268. Even those factors were tempered by positive comments. *See* JA 268-69 (noting, for example, that Executive Life's CEO had a reputation as a "gunslinger" in the 1960's, but stating, "His record [today] would indicate otherwise. He has run Executive Life since 1974 [for 12 years] and its record of growth is admirable."). Overall, the author was "reasonably comfortable" with recommending Executive Life. JA 267.

- "Publicly available information reviewed by Plaintiffs' expert" showed that "60-70% of Executive Life's total assets . . . consisted of junk bonds. . . . (JA 435-438. *See also* JA 457, 1373)." Petition at 3-4.

and

- "Murdock knew about the high proportion of junk bonds in Executive Life's portfolio . . . and understood that the risk associated with junk bonds made them an unsuitable investment for 'a pension plan for widows and orphans.' (JA 1601-02, 1638-1640)." Petition at 4.

One expert for Plaintiffs concluded that in 1985, "junk bonds comprised . . . 41.4 percent of all assets held" by Executive Life. JA 457. The "60-70%" number came from their other expert, but he claimed only that this was the percentage of Executive Life's assets which were "not rated investment grade." JA 435. That securities were not of the highest investment grade hardly means that they were "junk." Murdock testified that he and the Committee had carefully considered the issue, and did not believe that Executive Life held a high proportion of insecure investments:

> [Executive Life] had high yield bonds. I think of a junk bond as a bond that is just that, it has a very limited earning capacity and is way over leveraged. To say that all of the bonds that were held by Executive Life were junk bonds is an over statement. As time has proven, those so-called junk bonds have increased materially and are no longer considered junk bonds.

JA 1639-40. It was only in the context of that definition of "junk" bonds as over-leveraged with limited earning capacity, which excluded most of Executive Life's holdings, that Murdock said he "would not put any junk bonds into a pension plan for widows and orphans." JA 1638.

What Plaintiffs fail to even mention is that the Committee upon which Murdock relied thoroughly investigated this precise issue. The four members of the Committee had extensive experience in investment banking, financial analysis, and pension plan administration. JA 1430-33, 1897-1902, 1913-14, 1928, JA 1902, 1964-65, JA 1503-07, 1520, JA 1614, 1756-58. The Committee received written evaluations from Hewitt Associates, its expert consultant, as to each of the carriers in the final running, JA 1770, but did not rest on those evaluations. The Committee put together its own evaluation worksheets on each carrier, and gathered additional detailed financial information on several of the carriers, including Executive Life. JA 1767-68.

Two members of the Committee, Werner and Halpern, personally conducted an in-depth analysis of the investment portfolio of each carrier, and these two were

experts in this field. JA 1770. Werner testified that Executive Life's high-yield portfolio was "very diversified," with "between 700 or 800 different issuers." JA 1987. That diversification was a key reason why Executive Life's high yield portfolio was not believed to present undue risk. In addition, the portfolio was "very short-term," meaning that Executive Life was "not subject to the same kind of interest rate risk that a number of other insurance companies were." *Id.* As a result, the Committee reasonably concluded that Executive Life was in a better position to weather interest rate changes than the other bidding insurance companies, many of which were locked in to large long-term real estate holdings. *Id.*

It is significant that this conclusion by the Committee, that Executive Life was extremely well-managed, well-financed, and very secure, was confirmed by every expert assessment which Murdock and the Committee had available to them. For example, the analysis of Conning & Company dated February 18, 1986, JA 982-999, noted that the high-yield bond portfolio's "risk adjusted performance has been superior," JA 992, and recognized, as did the Committee, that the portfolio was both highly diversified and relatively short term, providing a "high degree of flexibility." JA 993. Together with "a debt-free balance sheet that is one of the strongest in the life insurance industry," JA 985, "conservative accounting practices," JA 986, and $6.9 billion in reserves, JA 987, the "largest component" of which were "very low risk," JA 989, these factors led Conning & Company to conclude that the company was "one of the best managed" life insurers in the United States. JA 985. *See also* JA 267-268

(Hewitt analysis which noted that Executive Life's portfolio had a short average maturity and was highly diversified, and concluded that it had "one of the strongest balance sheets in the industry" and "the best investment performance"); JA 290 (giving highest ratings, and concluding that Executive Life's "capital and surplus position in relation to overall insurance risk" is "significantly above that of the average life insurance company.").

Plaintiffs' assertion that Murdock and the Committee knew or should have concluded that Executive Life's portfolio was in any way "an unsuitable investment for a pension plan" is flatly contrary to the undisputed record.

- "Plaintiffs' well-qualified experts submitted reports which concluded that the selection of Executive Life was imprudent based upon publicly available information which a reasonable investigation would have revealed. (JA 432-499)." Petition at 5.

Plaintiffs' two experts, Cox and Babbel, certainly expressed the conclusory *opinion* that Murdock should have known Executive Life was insecure in 1986. The *evidence* upon which they purported to rely, however, supports no such inference, as the District Court recognized.

Cox's report, JA 453-475, identifies only two pieces of concrete adverse information relating to Executive Life which could have been available to the Committee prior to July, 1986. One was the California Department of Insurance report discussed *supra* at 2-3. The other consisted of Insurance Regulatory Information System ("IRIS") financial ratios compiled by the NAIC, which Cox claims "should have alerted the fiduciaries to possible default

risk," supposedly because Executive Life had four or more ratios outside the "normal ranges" from 1981 through 1983. JA 455-56. However, the record is undisputed that the NAIC itself, which defines the IRIS ratios and compiles them for all insurers, found no need to take any action with respect to Executive Life on this basis. *Id.*

It is telling that virtually all of the truly significant adverse events concerning Executive Life are discussed in Cox's report under the heading "Monitoring the Investment." *See* JA 459-460. None of these events had happened as of July 2, 1986, as Cox's report explicitly concedes. *Id.*

Babbel's report purported to list "public information that was readily available by July 2 of 1986," JA 434, but in terms of material adverse information which would have been available to the Committee, he identified nothing different than did Cox. *See* JA 451-52.[2] His deposition testimony confirms the hindsight nature of his analysis. For example, he testified to his opinion that Executive Life had inadequate reserves in mid-1986, but when

---

[2] Other than articles in the popular press, most of which were far from critical (*e.g.*, a *Fortune* magazine article listing Executive Life among "America's Most Admired Corporations," JA 451), Babbel lists only Executive Life's public filings, and six "Miscellaneous" documents. *Id.* The six consist of the California Insurance Department report already discussed; A.M. Best Co. reports; two Conning & Company analyses written in July and December, 1986, which did not exist at the time of the Committee's selection process; and two private, unpublished letters by securities analysts to their clients, as to which there is no evidence that Murdock and the Committee ever knew of their existence or could have had any access to them.

asked if he would have estimated that *in 1986*, he responded, "I can't say." JA 1306. He also talked about the volatility of junk bonds, but admitted that the very first working paper on the subject did not come out until 1986, and couldn't say whether it was before or after July of that year. JA 1307-08.

The Plaintiffs' experts simply failed to identify any material information which was available to Murdock and the Committee, and which would have in any way changed their reasonable determination that Executive Life would provide a safe and secure annuity.

- Murdock chose "an annuity carrier on the basis of price in order to maximize his own reversion," citing several record references. Petition at 5-7.

None of the evidence cited by the Plaintiffs in support of this assertion indicates, or even implies, that Murdock or the Committee in any way compromised the interests of Plan participants in order to obtain a lower-priced annuity. To the contrary, the evidence is undisputed that in the first round of bidding, Executive Life's bid came in more than two million dollars less than the next lowest bidder, and if Murdock and the Committee had been price shopping, they could have simply accepted that bid without further question. JA 1981-83.

They did not do that. Instead, they went back to Executive Life as well as to the other carriers in the bidding, making sure that each had correctly analyzed the data, and refining some of the bid specifications. The result was that Executive Life's bid in the next round went up by more than two million dollars, and was only $500,000 less than the next lowest bidder. *Id.*; JA 952. That

is hardly the behavior of one simply choosing on the basis of price.

The "evidence" relied on by Plaintiffs to the contrary falls into two categories. First, there is conclusory testimony from their experts that because surplus plan assets were to revert to Murdock, by definition a lower priced annuity would increase the size of the reversion, giving rise to what Plaintiffs' experts called an inherent conflict of interest on the part of Murdock and his employees and consultants. *See, e.g.*, JA 461, 1374-76. This sort of theoretical "conflict" is present in every termination of a plan with surplus assets, of course. In fact, there is no real conflict because it is clearly in the long term interest of the plan sponsor to be certain to obtain a safe annuity provider, in order to avoid later repercussions. *See* JA 1566.

The second kind of evidence relied on by Plaintiffs is evidence that, *after* the thorough and meticulous investigation of each candidate by the Committee, and after it had assured itself that all of the potential annuity providers were sound, safe and capable, price then became one factor upon which the choice between the remaining excellent candidates was made. The mere fact that price was a consideration in no way establishes, however, that price was an *inappropriate* consideration. The testimony was universal and undisputed that throughout the process, the Committee and Murdock had *three* critical criteria in mind: the financial stability of the insurance company, the ability of the company to administer the annuity, and the price. JA 955-80, 1693-95, 1698, 1969-71, 1979-81, 1994-2000. Since, in the last round of bidding, the

difference between Executive Life's bid and the next lowest bidder was less than one-half of one percent of the bid, JA 952, price obviously was not a significant consideration.

* * *

The point of this factual summary is not to attempt to establish that there was no negative information about Executive Life. The point, rather, is that the evidence is uncontradicted that Murdock and the Committee did exactly what ERISA fiduciaries are supposed to do: they conducted a thorough and careful investigation, they obtained all the information they could on all the annuity providers, they analyzed that information and actively considered the positives and negatives about each candidate, and they made a reasonable and prudent decision based on all the information available. The District Court was correct as a matter of law in determining that this course of conduct, about which there can be no reasonable dispute, was consistent with the duties of fiduciaries under ERISA.

SUMMARY OF THE ARGUMENT

The attempt by Plaintiffs to portray the decision below as in conflict with decisions by other federal circuits fails. The Fourth Circuit opinion, and that of the District Court which it approves, is completely consistent with the law in other circuits regarding the nature of a fiduciary's legal obligations under ERISA. The Fourth Circuit correctly reached a different outcome than that of recent Third and Ninth Circuit cases only because the

same legal standards were applied to radically different fact situations.

The material facts concerning Murdock's conduct as a fiduciary are undisputed, including the qualifications of the Committee on which he relied, the diligent investigation they conducted, and the facts which were reasonably available to the Committee as of the time the selection of an annuity provider was made. The District Court applied the settled legal standards of fiduciary conduct under ERISA to these undisputed facts, and properly found that no breach of fiduciary duty could be shown. Plaintiffs cannot defeat summary judgment simply by reliance on unsupported and conclusory expert opinions to the contrary.

The Fourth Circuit was not bound to apply the Department of Labor's ("DOL") current interpretation of ERISA fiduciary obligations to conduct which took place ten years earlier. Whatever the ongoing validity of the DOL interpretation may be, the Fourth Circuit rightly held that it was not properly applicable to Murdock with respect to action he took in 1986, when the DOL had never even thought of the "safest available annuity" approach.

This case is in any event inappropriate for certiorari because Murdock has preserved a substantial *res judicata* defense which could preclude this Court from ever reaching the merits.

REASONS FOR DENYING THE WRIT

An experienced trial judge, affirmed by a unanimous Court of Appeals, carefully scrutinized the record made by Plaintiffs in this case, and, applying well-established and uncontroversial principles of ERISA law, concluded that the evidence does not create a triable issue of breach of fiduciary duty under ERISA. Plaintiffs now attempt to transform this unremarkable result into a basis for this Court to exercise its extraordinary certiorari powers through two devices.

First, Plaintiffs assert that, because the Third and Ninth Circuits have recently decided cases involving Executive Life in which summary judgment was not appropriate, the decision that summary judgment is appropriate in this case must necessarily be in conflict. Second, they argue that the issuance of summary judgment here was so severe a departure from the accepted and usual course of proceedings as to require the exercise of this Court's supervisory powers. Neither argument has any substance, and both are simply efforts to induce this Court to re-weigh yet again a factual record which was meticulously examined by the courts below.

I. The Opinion Below Creates No Conflict Among The Circuits.

Plaintiffs contend primarily that the decision below conflicts with *In re Unisys Savings Plan Litigation*, 74 F.3d 420, *reh'g denied*, 74 F.3d 433 (3d Cir.), *petition for cert. filed*, No. 95-1808 (May 6, 1996) ("*Unisys*") and *Pilkington PLC v. Perlman*, 72 F.3d 1396 (9th Cir. 1995) ("*Pilkington*"). The opinion of the District Court below as adopted by the

Fourth Circuit, however, applies exactly the same legal principles and standards as those announced in *Unisys* and *Pilkington*. The different outcomes are the result of dramatic differences in the respective factual records.

A. The Decision Below Applied The Same Settled Legal Principles As Are Recognized In *Unisys*, But To A Different Factual Record.

The Third Circuit in *Unisys* held that the duty of prudence under ERISA is properly evaluated

> according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment. (Citations omitted)

74 F.3d at 436. The District Court below applied precisely these same principles:

> Courts have articulated two ways in which to measure a fiduciary's use of prudence in carrying out their duties. The first is whether the fiduciary employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation. *See Schaefer v. Arkansas Medical Sos.*, 853 F.2d 1487 (8th Cir. 1988); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984); *Bidwell v. Garvey*, 743 F.Supp. 393 (D. Md. 1990).

Appendix to Petition For Writ Of Certiorari (hereinafter cited as "App.") at 32-33.

Plaintiffs have not and cannot identify any meaningful difference between what the Third Circuit and the Fourth Circuit understand to be the fiduciary duties under ERISA. All they can point to is a different result in the two cases, a difference that is not only unremarkable but unavoidable in light of the radically different nature of the facts before the two courts. The following discussion highlights some of the more significant factual differences.

1. The Committee Conducted The Independent Investigation Missing In *Unisys*.

The Third Circuit's denial of summary judgment resulted not because the Unisys fiduciaries turned out to be wrong, but because there was evidence that they had failed to conduct a proper investigation. The Third Circuit was particularly troubled by evidence that suggested that the fiduciaries did little or no independent analysis, but relied blindly on their outside consultant. It held that ERISA "requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement where necessary." 74 F.3d at 435.

In the present case, the evidence is undisputed that the Committee appointed by Murdock performed exactly the substantial independent investigation and analysis of Executive Life that the Third Circuit considered to be appropriate. Indeed, when the Committee received a written evaluation from Hewitt as to each of the carriers in the final running, it immediately went to work, putting together evaluation worksheets on each of the nine respondents to the original bid solicitation, gathering

additional detailed financial information, examining audited financial statements, public filings, Best reports, and all other public information they could obtain, and doing an in-depth analysis of each carrier's investment portfolio. *See supra* at 5-7.

This is precisely the detailed, independent investigation which the Third Circuit found lacking in *Unisys*, where the record showed that "Unisys's investigation consisted of nothing more than confirming that Executive Life's credit ratings had not changed since June, 1987." *Unisys*, 74 F.3d at 436.

2. The Negative Information Available To Unisys Fiduciaries Did Not Exist In 1986.

Recognizing that the "thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered," 74 F.3d at 436, the Third Circuit held "that one who investigated Executive Life *in 1987 and 1988* would have found" that Executive Life's high ratings had been questioned or lowered, and that other warning signs had begun to surface. 74 F.3d at 436 (emphasis added).

Because the purchase of the Cannon annuity contract occurred on July 2, 1986, the Committee's investigation could have uncovered none of those facts that were significant to the Third Circuit. To the contrary, the record in this case shows that the publicly available ratings of Executive Life as of that time, not only from Best, but also by Standard & Poors' *Credit Week* and Conning & Co., were all very positive. JA 1000-1001, 982-999, 1975-76.

Virtually all negative ratings of Executive Life or adverse action by state regulatory authorities occurred after July 1986. *See supra* at 7-9.

3. The Fiduciaries In *Unisys* Failed To Follow The Recommendation Of Their Experts.

In *Unisys*, the outside consultants had recommended purchase of only a three-year GIC, but Unisys purchased one of five-years' duration to obtain a higher interest rate. Again, the Third Circuit criticized the lack of a responsible decision-making process, not the merits of decision. 74 F.3d at 437. In the instant case, there is no evidence that anything the Committee or Murdock did was inconsistent in any way with the recommendations, advice and information received from all the experts consulted.

4. The Bid Process In *Unisys* Was Improper.

The Third Circuit questioned whether the Unisys fiduciaries were "equipped to conduct GIC bids unassisted," which they did in their last two purchases, and whether it was prudent to do so without written guidelines. 74 F.3d at 437. In this case, of course, the bid process was properly conducted by independent experts pursuant to written guidelines.

5. The Purchase Of GICs In *Unisys* Involved A Continuing Duty To Monitor That Did Not Exist In This Case.

Unisys involved three separate purchases of GICs by an ongoing plan. In that context, the fiduciaries were under a continuing duty to monitor the investments and evaluate their reasonableness on an ongoing basis. By contrast, the present case concerned the purchase of a group annuity contract upon termination of a plan. ERISA imposes no continuing duty to monitor in such a situation. In fact, because the group annuity contract executed in 1986 was irrevocable and binding on both sides, JA 1027-39, Murdock would have been powerless to change the annuity provider regardless of what later "monitoring" might have revealed.

Under Plaintiffs' theory, Petition at 18, 33-34, one who terminated a plan and purchased an annuity to satisfy its obligations would have a perpetual responsibility thereafter to monitor the annuity provider and take some unspecified remedial steps if the company ever had financial problems. Neither *Unisys* nor any of the other cases cited by Plaintiffs so hold.

* * *

The record before the Third Circuit contained concrete evidence from which a reasonable fact finder could conclude that the Unisys fiduciaries failed to satisfy the duty of prudence. None of those facts are present here. It is that simple reality, not any conflict in the legal principles applied, which led to differing results which were appropriate in each case.

B. The Decision Below Is Consistent With That Of The Ninth Circuit In *Pilkington*.

Plaintiffs assert that the decision below conflicts with that of the Ninth Circuit in *Pilkington PLC v. Perlman*, 72 F.3d 1396 (9th Cir. 1995). Again, though, nothing suggests that the two courts were applying a different legal standard. The supposed "conflict" is nonexistent given the significant factual distinctions between the two cases.

1. The Bid Process In *Pilkington* Was Not Independent.

In *Pilkington*, Revlon, the plan sponsor, asked Executive Life to submit a price quote for the annuity *before* inviting bids from other carriers, and then made an advance deposit of $18 million toward the purchase of an Executive Life contract before the bidding process for other insurance carriers had even opened. 72 F.3d at 1397. Those extraordinary actions obviously signalled to the Ninth Circuit that the fiduciaries may not have acted with independence and objectivity.

The highly questionable behavior of the *Pilkington* fiduciaries contrasts dramatically with the conduct of the Committee in the instant case, where a genuinely independent and objective bid process was conducted by an outside consultant under the direction of fiduciaries other than Murdock.

2. Revlon Failed To Make An Independent Investigation Of The Insurance Companies.

The *Pilkington* decision suggests that Revlon relied blindly on the ratings from Best and Standard & Poors without doing any further investigation. The Ninth Circuit held that "[l]egal authority does not support [Revlon's] contention that a mere ratings scan satisfied their fiduciary duty of loyalty to the plan." 72 F.3d at 1401 (citations omitted). As the record cited above, *supra* at 5-7, makes abundantly clear, the Committee's thorough independent investigation of Executive Life in this case was precisely the behavior that was absent in *Pilkington*.

A fiduciary's careful investigation of a transaction, such as occurred in this case, is generally determinative of whether the fiduciary's decision was made for the exclusive purpose of benefiting plan participants. *See, e.g., Donovan v. Bierwirth*, 680 F.2d 263, 271-276 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *Anderson v. Mortell*, 722 F. Supp. 462, 470 (N.D. Ill. 1989); *Donovan v. Walton*, 609 F. Supp. 1221, 1244-46 (S.D.Fla. 1985), *affirmed*, 794 F.2d 586 (11th Cir. 1986). Its presence here, and absence in *Pilkington*, was obviously a determinative factor.

3. Executive Life's Bid In *Pilkington* Was Substantially Below All Other Bids.

Executive Life's bid on the Revlon annuity was $85 million, a tidy $13 million lower than the next lowest bid, which was a difference of some 15 percent. 72 F.3d at 1397. Not surprisingly, the Ninth Circuit held that such a dramatic price differential was enough to raise a triable

issue as to whether the selection of Executive Life was excessively motivated by price.

The undisputed facts make clear that such a motivation was absent here. *See supra* at 9-11. If the Committee had been price shopping, it could have simply jumped on Executive Life's bid in the first round, which was more than two million dollars less than the next lowest bidder, but the evidence is uncontroverted that it did not do so. The result was that in the second round of bidding, Executive Life's bid was lower than CIGNA's by only $500,000 on a total bid of approximately $78 million. JA 952.

Unlike the record in *Pilkington*, then, the undisputed facts here make clear that price was not a significant factor in the selection of the annuity provider.

4. The *Pilkington* Fiduciaries Had A Quid Pro Quo Relationship With Executive Life.

Revlon had a close relationship to Executive Life, because Executive Life had purchased a large amount of Revlon's own "junk bonds". 72 F.3d at 1402. The Ninth Circuit held that this evidence could lead a fact finder to conclude that Revlon did not have an arms-length relationship with Executive Life, and may have had actual knowledge that Executive Life's portfolio was insecure since Revlon obviously had inside knowledge of the insecurity of its own bonds. *Id.*

No such circumstances are present here. There is no evidence that Executive Life ever held any bonds issued by Murdock's companies.[3]

* * *

None of the facts that made summary judgment inappropriate in *Pilkington* are present in this case. The results in the two cases are entirely consistent, and present no appropriate ground for intervention by this Court.

C. The Fourth Circuit's Decision Does Not Conflict With Those Of Other Circuits In Any Other Respect.

1. The Selection Of Executive Life Did Not Violate The Diversification Requirement.

Plaintiffs contend that the District Court erred in failing to consider whether Murdock breached the duty of "diversifying the investments of the plan" under ERISA § 404(a)(1)(C). Petition at 17-18. They are half right. The District Court did not apply the diversification requirement, but it was completely correct in not doing so because that requirement applies only to an ongoing plan, not to the purchase of a group annuity contract for a terminated pension plan. *See, e.g.*, H.R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5084-85; *Etter v. J. Pease Construction Co.*,

---

[3] While there was some brief overlap in the extensive investment portfolios of Executive Life and Murdock's companies, the record shows that such common holdings were transitory and *de minimis*. JA 520, 521, 524, 535, 540, 509-18. There is no evidence that Murdock or anyone on the Committee was even aware of these holdings by Executive Life.

Inc., 963 F.2d 1005, 1010-11 (7th Cir. 1992), and cases discussed therein. Plaintiffs have not cited a single case or other authority to support the proposition that the diversification requirement applies in this context.

2. The Fourth Circuit's Decision Does Not Conflict With That Of Any Other Circuit Regarding Breach Of Fiduciary Duty Under ERISA.

Contrary to Plaintiffs' assertions, Petition at 18, the Fourth Circuit did not hold that fiduciaries who profit by a breach of fiduciary duty are not subject to liability if the plan beneficiaries do not suffer direct financial loss. The question of whether a fiduciary breach has caused loss to plan participants or profit to the breaching fiduciary is necessarily only reached once a breach of fiduciary duty has been established. The Fourth Circuit properly did not reach this issue because it concluded that there was no breach of fiduciary duty.

Plaintiffs also complain that the Fourth Circuit allowed the District Court to improperly "collapse" the duty of loyalty under ERISA into the duty of prudence. Petition at 16. Yet even Plaintiffs concede that the duty of prudence "may overlap" the duty of loyalty. *Id.* The District Court did no more than recognize that the facts of this case place it squarely in the overlap. *See* App. at 35. Given that the decision to purchase the annuity contract from Executive Life was prudent, as the record establishes, Plaintiffs have not even suggested any independent basis upon which Murdock could nonetheless have breached the duty of loyalty.

D. Conclusion With Respect To Alleged Breach Of Fiduciary Duty.

The decision to terminate the Plan was a permissible one; the process employed to select the insurer was an unimpeachable one; and Murdock's eminently reasonable and proper acceptance of the Committee's recommendation satisfied his fiduciary duties fully. The unforeseeable troubles of Executive Life five years after the fact, troubles which to this day have not resulted in the loss of a single dollar of benefits to any of the Plaintiffs or to any other Plan beneficiary, do not alter these facts in any way. The courts below correctly recognized that there is no evidence in the record which could reasonably support a finding of breach of fiduciary duty by Murdock, a result entirely consistent with settled ERISA jurisprudence, and providing no ground for issuance of a writ by this Court.

II. The Disposition Below In No Way Departed From The Accepted And Usual Course Of Proceedings.

A. Plaintiffs Presented No Evidence Of Genuine Issues Of Material Fact.

In the context of claims of breach of fiduciary duty under ERISA, whether given actions do or do not constitute a breach of duty is an issue of law. *See, e.g., Hayes v. United States,* 899 F.2d 438, 443 (5th Cir. 1990) ("The existence and extent of a duty of care are questions of law"); *Johnston v. Holiday Inns, Inc.,* 595 F.2d 890, 895 (1st Cir. 1979) ("[W]hether certain acts constitute a breach of fiduciary duty is a question of law, not an issue of fact."). Thus, where, as here, the conduct undertaken by the fiduciary is not in dispute, whether such undisputed

conduct breaches duties under ERISA is a legal issue appropriate for resolution on summary judgment.

Plaintiffs do not point to specific facts of record which create a triable issue, but simply offer generalized accusations that the District Court "abdicated its responsibility" to analyze the "voluminous [unspecified] facts" which Plaintiffs say they presented. Petition at 20. Recourse to the record makes clear that it simply does not support Plaintiffs' overblown claims. *See supra* at 2-11.

Plaintiffs also rely heavily on the opinions of their two experts that Murdock and the Committee should have known in 1986 that there were problems which would lead to Executive Life's demise in 1991, claiming that these opinions were enough standing alone to defeat summary judgment. Petition at 13, 20-21.

If the mere fact that an expert reviews the factual record and opines that fiduciary standards were not met were enough to defeat summary judgment, then summary judgment would never again be granted against any plaintiff who has the minimal money and sense it takes to hire an expert to say that. The District Court properly refused to so eviscerate Rule 56. It recognized the well established rule that mere conclusory opinions of an expert, unsupported by competent record evidence, are insufficient to defeat summary judgment. *See, e.g., Tyger Construction Corp., Inc. v. Pensacola Construction Co.*, 29 F.3d 137, 145 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995); *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) (experts can present "naked opinions," but

"[a]dmissibility does not imply utility"; where foundation facts are absent from record, expert opinion insufficient to create jury issue); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 n. 27 (D.C. Cir. 1977).

What is pertinent, and what the District Court properly examined on summary judgment, was whether Plaintiffs or their experts offered not just opinions, but competent record evidence sufficient to raise a material issue of fact. The District Court was correct in concluding that they did not. To the contrary, Plaintiffs' experts relied almost exclusively on events and information which postdated the annuity purchase in mid-1986, and which therefore could not possibly have been considered by Murdock and the Committee. *See supra* at 7-9.

The Fourth Circuit's decision in *M & M Medical Supplies v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S.Ct. 2962, 125 L.Ed.2d 662 (1993), deals with a different issue from that presented in this case. *M & M* concerned the *admissibility* of an expert's affidavit under Rule 56(e), F.R.Civ.P., holding that an affidavit which states the facts upon which an opinion is based is admissible even though the supporting data is not attached. 981 F.2d at 166. Here, the District Court did not hold the expert reports inadmissible. To the contrary, it received and analyzed those reports and the evidence which they purportedly relied on, and concluded that Plaintiffs and their experts "have not offered any evidence to support the opinion that Murdock and the Committee should have known of any problems at Executive Life in 1986." App. at A-35. That is precisely

why Rule 56 and *M & M* require an affidavit to recite the facts of record relied on, so that the court is in a position to evaluate whether the evidence actually supports the conclusory opinion offered. When it does not, the opinion, though admissible, is not sufficient to defeat summary judgment. *Mid-State Fertilizer Co., supra; Tyger Construction Co., Inc., supra.*

B. The Department Of Labor's Interpretation Of ERISA Is Irrelevant To This Case.

Plaintiffs argue at some length that the District Court and the Fourth Circuit were *required* to accept and apply the "safest available annuity" theory recently advanced by the Department of Labor. Petition at 20-24. Even if the DOL's new re-interpretation of 21-year-old statutory language could somehow be justified prospectively, the law certainly does not require the imposition of such a standard retroactively on conduct which occurred in 1986.

"Retroactivity is not favored in the law," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988), and "is contrary to fundamental notions of justice." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 1586, 108 L.Ed.2d 842, 865 (1990) (Scalia, J. concurring). As this Court stated in *Bowen*:

> The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

488 U.S. at 208-09. For these reasons, whether to grant or deny retroactive force to a new administrative interpretation is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision. *See, e.g., Retail, Wholesale and Department Store Union v. N.L.R.B.*, 466 F.2d 380, 389-90 (D.C. Cir. 1972); *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250, 1258-59 (3d Cir. 1978). Retroactivity is certainly inappropriate where, as with the DOL's new "interpretation" of ERISA, "[P]ersons could be held liable for the violation of standards which they properly believed were not applicable to them at the time of their acts." *Hughes v. Heyl & Patterson*, 647 F.2d 452, 454 (4th Cir. 1981).

The Fourth Circuit's refusal to apply the Department of Labor's novel theory retrospectively was plainly appropriate.

III. This Case Is Particularly Ill-Suited For Review On Certiorari Because Plaintiffs' Claims Should Be Barred By *Res Judicata*.

In October, 1986, a suit was commenced against Murdock and others which alleged, *inter alia*, breaches of fiduciary duties under ERISA in amending and terminating the Plan. *See Amalgamated Clothing & Textile Worker's Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). The plaintiff union sought relief on behalf of all Plan participants, which included Plaintiffs here. Ultimately, the case was settled, JA 1057-71, and upon consent of all parties, a final judgment was entered dismissing the action with prejudice. *Id.*

The District Court rejected Murdock's plea of *res judicata*, App. at 30-31, and Murdock preserved the issue before the Fourth Circuit, which did not address it explicitly. The presence of such an issue which could be dispositive other than on the merits counsels against certiorari.

CONCLUSION

The old adage is that when fishing, one should fish where the fish are. The District Court and the Fourth Circuit have simply told the Plaintiffs that there are no fish here. Plaintiffs' disappointment is understandable, but unwarranted. Their Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 3rd day of October, 1996.

RALPH M. STOCKTON, JR.
Counsel of Record
RODRICK J. ENNS
WILLIAM E. WRIGHT
PETREE STOCKTON, L.L.P.
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (910) 607-7300

Attorneys for Respondent
David H. Murdock

No. 96-324

(3)

Supreme Court, U.S.
FILED
OCT 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similarly situated,

Petitioners,

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY BRIEF

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondent's Brief Disputes The Facts, Thus Confirming The Impropriety Of Summary Judgment On The Issue Of Whether Murdock Breached The Duty Of Prudence 1

A. Respondent Concedes The Existence Of Facts Available To The Fiduciary That A Prudent Investigation Would Have Uncovered 4

B. Respondent's Brief Raises The Conflict In The Circuits On The Continuing Duty To Monitor Applicable To A Fiduciary's Purchase Of A Plan Termination Annuity 5

II. By Admitting That Price Was One Of Three Critical Factors In The Annuity Selection, Respondent Highlights The Conflict On The Application Of The Duty Of Loyalty 8

III. Contrary To The Law Of Every Other Circuit, Respondent Argues That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Need Not Disgorge His Unjust Enrichment 8

IV. Respondent's Attempt To Justify The Exclusion Of Plaintiffs' Experts Demonstrates The Error Of The Courts Below 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Fink v. National Savings and Trust Co., 772 F.2d 951, 962 (D.C. Cir. 1985) 2

In re Unisys Savings Plan Litigation, 74 F.3d 420, 436 (3d Cir. 1996), *cert. denied*, 1996 US LEXIS 4673 (October 7, 1996) 2, 3, 4

M & M Medical Supplies v. Pleasant Valley Hospital, Inc., 981 F.2d 160 (4th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) 9

Pilkington PLC v. Perelman, 72 F.3d 1396 (9th Cir. 1995) 5, 7

Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 918 (8th Cir. 1994) 2

OTHER

29 C.F.R. § 2509.95-1 7

ERISA § 404 8

Fed. R. Civ. P. 56(e) 9

Respondent's Brief In Opposition To the Petition For Writ Of Certiorari confirms that there is a conflict among the circuits on the application of ERISA fiduciary duties to the purchase of a plan termination annuity and that the record below created triable issues of fact, thus highlighting the need for review by this Court.

I. Respondent's Brief Disputes The Facts, Thus Confirming The Impropriety Of Summary Judgment On The Issue Of Whether Murdock Breached The Duty Of Prudence.

Throughout Respondent's Brief, Murdock challenges the Plaintiffs' Statement Of The Case and urges this Court to view the facts that he presents through his own peculiar prism. Despite the accusation of "distortion or outright misrepresentation," Respondent's Brief at 1, Respondent's Statement of the Case really argues that Respondent would draw different inferences from the record, which he incompletely and inaccurately relates.

A. Respondent Concedes The Existence Of Facts Available To The Fiduciary That A Prudent Investigation Would Have Uncovered.

One factual argument that Respondent makes is that "the Committee upon which Murdock relied thoroughly investigated this precise issue. . . . " Respondent's Brief at 5. Respondent's Brief is unclear about what precise issue was thoroughly investigated by Murdock's Committee. Moreover, the motions that the Committee may have gone through to do its supposed investigation (which Plaintiffs do not concede was either substantial or independent) are not the sole measure of prudence. Rather, as

the Third Circuit recently concluded, "the thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, *but by the facts that an adequate evaluation would have uncovered.*" *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 436 (3d Cir. 1996), *cert. denied*, 1996 US LEXIS 4673 (October 7, 1996) (emphasis supplied) (citing *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J. concurring in part and dissenting in part)).

Under the measure of prudence set forth in *Unisys*, the facts available to the Plan fiduciaries when they performed their investigation are material to the ultimate resolution of the issue of whether Murdock breached his duty of prudence. Respondent concedes that these facts included those disclosed in Executive Life's public filings, such as Executive Life of California's 1983, 1984 and 1985 NAIC annual statements, Executive Life of New York's 1983, 1984 and 1985 NAIC annual statements, and the 10-K's of Executive Life's parent, First Executive Corporation, for 1983, 1984 and 1985. Respondent's Brief at 8 n.2 (making reference to the report of one of Plaintiffs' experts at JA 438, 451). Respondent also recognizes the existence of an April 17, 1986 memorandum by Hewitt Associates, expressing at least "four 'potential negatives' [about Executive Life] which were 'worth monitoring.' " Respondent's Brief at 4; JA 267-270. The availability of such information, not the number of times that the Committee waved a "magic wand" over the transaction, *see Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994), determines the thoroughness of the investigation and whether the duty of prudence was satisfied.

Another factual argument that Respondent makes is that "[v]irtually all negative ratings of Executive Life or

adverse action by state regulatory authorities occurred after July 1986." Respondent's Brief at 17. This carefully worded statement, addressing negative ratings but not the other negative information that abounded before July, 1986, is belied by Murdock's own brief. In addition to the references to public disclosures discussed above, Respondent's Brief at 2-3 addresses the report of the California Department of Insurance, determining that Executive Life was statutorily insolvent in 1984, two years before the annuity purchase. In a list of documents supporting his report, one of Plaintiffs' experts notes that this report of examination was released to the public on 11/14/85, and was circulated earlier. (JA 451). Nonetheless, Respondent attempts to cast the determination of statutory insolvency as "purely a technical issue." Respondent's Brief at 3.

Obviously, the parties disagree about the facts that an adequate evaluation would have uncovered and the inferences to be drawn from the evidence. Indeed, Petitioners can controvert each and every "fact" proffered by Respondent. However, Petitioners recognize that this forum is not the place to resolve factual disputes. The simple points are: (1) the Courts below applied a standard of prudence that is different from the one applied by the Third Circuit in *Unisys*, thus demonstrating a conflict in the circuits; and (2) the parties' differing views of the facts and inferences concerning information available to the Plan fiduciary confirm that there are genuine issues of material fact and that Respondent was not entitled to judgment as a matter of law.

B. Respondent's Brief Raises The Conflict In The Circuits On The Continuing Duty To Monitor Applicable To A Fiduciary's Purchase Of A Plan Termination Annuity.

Respondent recognizes another conflict between this case and *Unisys* regarding the duty of prudence. Respondent's Brief at 18 concedes that one holding of *Unisys* is that in the context of an ongoing plan, a fiduciary has a continuing duty to monitor the investments. Respondent argues, however, that no such duty applies in the purchase of a group annuity contract upon termination of a plan, in part because he would have been powerless to change the annuity provider.[1] Respondent's Brief at 18.

Respondent's Brief concedes that additional negative information became publicly available between July, 1986, when Respondent accepted Executive Life's bid, and October, 1986, when the reversion was distributed to him. *See, e.g.*, Respondent's Brief at 2, 8 n.2, referencing the 1986 Best report and Conning & Company reports. Thus, after this additional information became known, the Plan still had approximately $38 million in assets, and steps could have been taken to protect the interests of the participants and beneficiaries. (JA 298). Nonetheless, according to Respondent, a fiduciary can, as a matter of law, ignore negative information about an annuity provider after he has accepted the bid, even though he later received millions of dollars in "surplus" assets with which additional security could be purchased.

---

[1] Petitioner had urged below that there was some duty to monitor after an annuity purchase and that there were facts supporting such a duty in this case. Petition at 5; Brief of Appellants at 18-19, 33-34.

Respondent's attempt to distinguish *Unisys* on this issue is unavailing, and Respondent's Brief raises yet another aspect of the duty of prudence on which the Third and Fourth Circuits conflict and on which summary judgment was inappropriate.

* * *

In short, Respondent's Brief supports Petitioners' contention that the opinions of the Courts below created a conflict in the circuits and that the Courts below erred in granting summary judgment.

II. By Admitting That Price Was One Of Three Critical Factors In The Annuity Selection, Respondent Highlights The Conflict On The Application Of The Duty Of Loyalty.

Respondent expressly concedes that: (1) price was a critical criterion for his selection of an annuity provider (Respondent's Brief at 10); (2) ERISA forbids an annuity selection which is "excessively motivated by price" (Respondent's Brief at 21); and (3) the Ninth Circuit correctly held in *Pilkington PLC v. Perelman*, 72 F.3d 1396 (9th Cir. 1995), that a large price differential is "enough to raise a triable issue" concerning whether the fiduciary's motivation deviated from that mandated by ERISA. *See Pilkington*, 72 F.3d at 1401. Respondent argues, however, that because Executive Life's winning bid was "only $500,000" less than the second lowest bid, "price obviously was not a significant consideration." Respondent's Brief at 11, 21.

Thus, Respondent attempts to harmonize this case with *Pilkington* by contending, in effect, that a fiduciary is

always permitted to be guided by his own pocketbook as long as his gains are not so "dramatic" as to make the influence on his choice "excessive," and that as a matter of law, an additional $500,000 profit is too trivial to be a significant factor.

There are three major flaws in Respondent's theory. First, the record does not support Respondent's claim that he only realized an extra $500,000 by choosing Executive Life. Rather, the actual differential appears to have been substantially in excess of $2 million. (*See* JA 298, 952-54, 1029).[2] Second, Respondent can point to no reason or authority for drawing the line of materiality at $500,000 or $3 million or any other arbitrary figure.[3] Third, the language, structure and purpose of ERISA do not permit *any* level of self-interested motivation by a fiduciary, but rather require a fiduciary to act solely in the interest of the plan participants and beneficiaries and for the exclusive purpose of providing benefits, in choosing a plan termination annuity. Thus, under ERISA, plan

---

[2] Moreover, the important price difference is not necessarily between the two lowest bids; rather it is the difference between the winning bid and the price of the annuity which would have been selected if the participants' and beneficiaries' interests were the sole criteria. At least three companies submitted bids that were more than $10 million higher than Executive Life's winning bid, and the record reveals no non-price reason for rejecting these companies. (*See* JA 298, 952-54, 1029).

[3] Indeed, the Courts below did not even attempt to draw any such line, but instead mistakenly assumed that a prudent investigation would in itself satisfy the duty of loyalty, without regard to the motivating influence of any price differential. *See* Petition at 16.

fiduciaries should be required to engage in some comparative analysis of the relative safety of available annuity providers, rather than simply considering competitive pricing.

For this reason, the Department of Labor is correct in interpreting the duty of loyalty as requiring, in the context of a plan termination annuity, that a fiduciary seek the safest available annuity to assure payment of the benefits which the plan promised to its participants. The Department of Labor's interpretation, now codified at 29 C.F.R. § 2509.95-1, favors the participants and beneficiaries over the fiduciary, and is the only proper accommodation of the parties' interests in light of ERISA's duty of loyalty. Respondent's attempt to create a safe harbor in which a fiduciary may favor his own interest without judicial scrutiny is patently inconsistent with ERISA and highlights the fundamental conflict between this case and *Pilkington*.[4]

Respondent's discussion of the duty of loyalty uncovers the glaring conflict between the decision of the Courts below and the decision of the Ninth Circuit in *Pilkington*. Review by this Court is needed to resolve this

---

[4] Respondent also recognizes that the *Pilkington* fiduciaries had a quid pro quo relationship with Executive Life, which contributed to the Ninth Circuit's view that there were triable issues of fact on the duty of loyalty. He then concedes that there is similar evidence in this case, but dismisses the "overlap" in Executive Life's portfolio and Murdock's companies as *de minimis*. Respondent's Brief at 22 n.3. As in Respondent's discussion of the price differential, his discussion of quid pro quo relationships shows that there is a conflict between *Pilkington* and the decision of the Courts below.

conflict and reassert the inviolability of the duty of loyalty.

III. Contrary To The Law Of Every Other Circuit, Respondent Argues That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Need Not Disgorge His Unjust Enrichment.

Respondent states that after a temporary shortfall, he made up the loss in benefits that occurred upon the demise of Executive Life. Respondent's Brief at 1. Respondent thus concedes that the participants' security, which ERISA was enacted to protect, has been jeopardized. Despite this fact, the Fourth Circuit refused to examine whether the Plan fiduciary breached his duties under ERISA § 404 because it determined that the Plan participants received their benefits. (App. 3).

As set forth in the Petition at 18-19, the analysis employed by every other circuit is otherwise. This Court should grant the writ to resolve the conflict created by the holding of the Courts below, in refusing to hold Respondent accountable for gains attributable to his breaches of fiduciary duty.

IV. Respondent's Attempt To Justify The Exclusion Of Plaintiffs' Experts Demonstrates The Error Of The Courts Below.

Respondent's discussion of the exclusion of Plaintiffs' experts reveals the error of the Courts below. First, Respondent's Brief at 25-26 cites a line of cases, relied upon by the District Court (App. 35), to support the inadmissibility at trial of "mere" conclusory, unsupported

opinions of an expert. However, Plaintiffs proffered the expert reports in opposition to a motion for summary judgment, rather than at trial; thus, these cases are inapposite. In the Petition at 21, Plaintiffs urge that the controlling case is *M & M Medical Supplies v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160 (4th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993), a point essentially conceded in Respondent's Brief at 26, stating that *M & M Medical Supplies* concerned admissibility of an expert's affidavit under Rule 56(e). Thus, Respondent confirms that *M & M Medical Supplies*, and not the cases concerning admissibility of expert testimony at trial, provides the controlling standard.

Second, even if Rule 56 required that supporting data be attached to an expert report, Respondent in effect concedes that Plaintiffs' experts did rely on "events and information." Respondent's Brief at 26. Moreover, Respondent concedes that the information upon which one of Plaintiffs' experts relied included Executive Life's public filings going back to 1983. *See* Respondent's Brief at 8 n.2 and discussion at page 2 *supra*. Thus, if expert reports on summary judgment must attach the factual support for the opinion, Respondent in effect concedes that Plaintiffs' experts met that standard, unless a company's filings with the SEC and similar public disclosures are irrelevant to an expert's opinion concerning the financial condition of a company.

Third, implicitly recognizing the impropriety of the District Court's refusal to consider the reports of Plaintiffs' experts that relied on public disclosures and other information, Respondent argues that the District Court did not hold the expert reports inadmissible, but rather received and analyzed those reports and the evidence upon which

they relied. The District Court's opinion at App. 34-35 and the cases relied upon therein make clear that the Court did no such analysis. Moreover, if it did undertake an analysis of the reports and the evidence relied upon, the Court improperly made a credibility determination on summary judgment.

Thus, Murdock's argument regarding Plaintiffs' expert testimony demonstrates that the Courts below applied the wrong standard and improperly ignored the ample support for Plaintiffs' expert opinions. The treatment of Plaintiffs' experts by the Courts below was a serious departure from judicial norms and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons and those in the Petition for Writ of Certiorari, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136